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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1943

McLEAN TRUCKING COMPANY, INC., THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND AMERICAN FARM BUREAU FEDERATION, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ASSOCIATED TRANSPORT, INC., BARTWELL BROTHERS, INC., ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

NOVEMBER 1943.

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 82) is reported in 48 F. Supp. 933. The report of the Interstate Commerce Commission (R. 8) is reported in 38 M. C. C. 137.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

The Commission, acting upon two applications of the appellee, Associated Transport, Inc., the one being filed under the "consolidation" provisions (Section 5) of the Interstate Commerce Act and the other being filed under the "securities" provisions (Section 214) of that Act, granted the applicant authority as follows: (1) to acquire control, through purchase of capital stock, of several common carriers by motor vehicle and, thereafter (within one year from date of the acquisition of control) to consolidate into itself the properties and operating rights of those carriers; and (2) to issue certain specified shares of its preferred and common stock to enable it to consummate the transactions (as agreed upon with the stockholders of the constituent carrier companies) and to provide funds for working capital and other corporate purposes. Prominent among the matters urged in the Commission proceeding by interveners opposing the applications was the contention that the Commission, in approving proposed transactions under section 5, was limited to such in respect whereof it could make certain specified findings which it was considered were required in order to conform the Commission's authorization to the antitrust laws; and this contention the Commission did not consider to be sound, particularly in view of the provisions of paragraph (11) of section 5 according relief from

the antitrust laws to any carriers and persons participating in a transaction approved by *it* under section 5. The lower court upheld the Commission's construction of the statute in this and other particulars and sustained its orders as in all respects valid; and the ultimate question presented is whether it erred in so doing. Subordinate questions presented are:

1. Whether the Commission, in approving the proposed transactions, acted under a misconception of the statute and its authority, and

2. Whether its orders approving and authorizing the transactions were supported by adequate findings and substantial evidence.

STATEMENT

This is a direct appeal from a final decree (R. 89) of the court below dismissing a bill of complaint filed by the appellant, McLean Trucking Company, Inc., seeking to have enjoined and set aside certain orders of the Commission. The other appellants herein, namely, the Secretary of Agriculture and American Farm Bureau Federation, had intervened in the suit in support of the bill.

1. Commission proceedings

The Commission proceedings, in which the orders were entered, are Docket No. MC–F–1612, *Associated Transport, Inc.-Control and Consolidation-Arrow Carrier Corporation et al.*, and

Docket No. MC–F–1613, *Associated Transport, Inc.-Issuance of Securities,* and they were instituted by the filing with the Commission, July 25, 1941, of two applications by Associated Transport, Inc., one of the appellees herein. By the first of the applications, Associated Transport sought authority under section 5 of the Interstate Commerce Act (1) to acquire control, through purchase of capital stock, of the following eight common carriers by motor vehicle:

Arrow Carrier Corporation, Paterson, N. J.
Barnwell Brothers, Incorporated, Burlington, N. C.
Consolidated Motor Lines, Incorporated, Hartford, Conn.
Horton Motor Lines, Incorporated, Charlotte, N. C.
McCarthy Freight System, Inc., Taunton, Mass.
M. Moran Transportation Lines, Inc., Buffalo, N. Y.
Southeastern Motor Lines, Incorporated, Bristol, Va.
Transportation, Incorporated, Atlanta, Ga.[1]

and (2) to consolidate into itself the properties and operating rights of these carriers within one year from date of acquisition of control. By

[1] These companies will hereinafter be referred to as Arrow, Barnwell, Consolidated, Horton, McCarthy, Moran, Southeastern, and Transportation, respectively. The territories of their operations are briefly described in subparagraphs (b)–(i), inclusive, of Paragraph III of the bill of complaint (R. 2–3).

the second of its applications, Associated Transport sought authority under section 214, Part II of the Act, to issue 54,049 shares of preferred and 880,311 shares of common stock, having par value of $100 and $1, respectively, to enable it to acquire control of the said companies and four associated noncarrier companies [2] to provide funds for working capital and other corporate purposes, and for conversion from time to time of the preferred stock proposed to be issued.

Under section 5 (2) (b) of the Interstate Commerce Act the Commission is empowered to approve acquisitions of control, mergers, and consolidations of carriers subject to its jurisdiction upon findings that "the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest";[3] and its said approval operates to relieve the carriers participating in the transaction from the antitrust laws and all other restraints or prohibitions of law, as provided in section 5 (11) of the Act, which reads in part as follows:

> *The authority conferred by this section shall be exclusive and plenary,* and any carrier or corporation participating in or re-

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[2] Barnwell Warehouse & Brokerage Co., Brown Equipment & Storage Co., Conger Realty Co., and Southern New England Terminals, Inc. These companies are described in subparagraphs (l)–(o) of Paragraph III of the complaint (R. 4).

[3] The pertinent provisions of section 5 are quoted in full in the appendix.

> sulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved from the operation of the antitrust laws,* and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *. [Emphasis supplied.]

Under section 214 of Part II, common or contract carriers, corporations organized for the purpose of engaging in transportation as such carriers and corporations authorized by the Commission to acquire control of any such carriers, are made subject to section 20a (2)–(11) of Part I of the Act which forbid the issuance of securities and assumption of obligations in respect of securities unless the Commission's authority therefor is first obtained, and which empower the Commission to grant such authority—

> if it finds that such issue or assumption: (a) is for some lawful object within its

corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

The applicant, Associated Transport, is a Delaware Corporation and was organized March 5, 1941, for the purpose of effectuating the transactions proposed and was not at the time engaged in any operations.[1] The motor carriers involved operated principally as common carriers of general commodities over regular routes, and together served the principal points in Massachusetts, Rhode Island, Connecticut, New York, Eastern Pennsylvania, New Jersey, Delaware, Maryland, the District of Columbia, Virginia and North Carolina. Their routes also extended from points in such area to Cleveland, Pittsburgh, Nashville, and Chattanooga, Tenn., Great Falls and McColl, S. C., and to New Orleans, La., and Pensacola, Fla., via Atlanta, Ga., and Montgomery, Ala.

The applications were heard upon a consolidated record. The Antitrust Division of the Department of Justice, the Secretary of Agricul-

[1] Associated Transport was organized as the vehicle through which it would be most convenient for the constituent companies to work out the unification through exchange of stock (R. 511–512).

ture, four fruit growers' associations, and Super Service Motor Freight Company, a motor carrier, intervened in opposition to the granting of the authority applied for. A number of other motor carriers, shippers, and shipper organizations, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America also intervened, but, excepting the last-named organization, which at the close of the hearings announced its support of the applications, took no definite position thereon (R. 10).

The hearings were held before an examiner and a large volume of evidence was introduced, both oral and documentary. A report, proposed by the examiner, was served on the parties, exceptions were filed thereto by the interveners opposing the applications, and the matter was orally argued before the Commission on January 26, 1942. On March 16, 1942, the Commission issued its report and orders granting its authority for the unification and consolidation, and for the issuance of securities, substantially as applied for but with certain conditions attached.

In a previous decision, *Transport Co.—Control—Arrow Carrier Corp. et al.*, 36 M. C. C. 61, the Commission had refused authority for a proposed unification through a holding company of 29 motor carriers, among which were included the 8 motor carriers herein involved. Subse-

quently the latter carriers became more than ever convinced of the urgent need for consolidating their operations and, in the view that the earlier decision pointed the way to a permissible consolidation, entered into arrangements intended to conform thereto (R. 523) and which formed the basis of the applications filed by the appellee Associated Transport. One of the principal objections to the earlier application was that under the plan which was there proposed, and condemned as wasteful, of continuing the 29 carriers as separate corporate entities without "definite plan for effectuating 'single title' ", the result of permitting the unification would, as stated by the Commission, have been "that two or more carriers under common control would be authorized to engage in duplicate operations over a large majority of the routes and throughout most of the territory involved" (36 M. C. C. 61, 86–87). The plan in the instant case was designed to avoid such objection and, referring to this, the Commission said that, while there was a substantial amount of duplicating operations involved in the case before it, the application, nevertheless, was not open to the objection of wastefulness for the reasons that the authority sought was an authority under which the stock control acquired was to continue for not more than one year; that the specific purpose of the period of stock control was to enable the effectuat-

ing of consolidation while at the same time avoiding certain substantial losses that would result from immediate consolidation; and that, in these circumstances, the acquisition of stock control was simply a step in effectuating the objective of consolidation (R. 21).

The question of the effect of the consolidation on the employees of the constituent companies was raised in the proceeding and the applicant's officers gave assurance that no dismissal of employees would result therefrom. Based on this and the showing in evidence that the demand for transportation was increasing and that there was an evident shortage of experienced personnel, the Commission considered that no substantial hardship would result to employees and that any minor detriment would be offset by the advantages that would accrue to them from the lower operating costs and greater stability of the applicant as compared with the respective carriers involved. At the oral argument the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, which had previously been opposed, announced that it supported the applications (R. 18, 19).

With respect to the economies and greater efficiency that might be expected to result from consolidation, the evidence was very strong. In the matter of equipment, it was shown that unification of operations would permit of a more efficient and

complete utilization of the equipment of the several carriers both by enabling an assignment of the vehicles best conforming to needs and by enabling consolidation of the tonnage of the carriers, which latter would result in a higher load factor for vehicles used in over-the-road service and a large reduction in the number of vehicles required for "peddler" runs and pick-up-and-delivery service (R. 15–16). In the matter of terminal facilities, it was shown that the 8 carriers maintained 179 separate terminals in 129 cities and towns, and that this situation permitted of large savings and improved service through consolidation and rearrangement of use (R. 16). In the matter of general and administrative expense, insurance and certain other expense, it was shown that the savings that could be effected by unification of the management of the 8 companies under the one head was very marked. (R. 17–18).

An especially important improvement in service which it was shown would be made possible, or at least greatly facilitated, was the inauguration, planned by Associated Transport, of through-trailer service between points where sufficient traffic was available to justify such service. This it was shown "would reduce terminal costs, loss and damage claims, and the time in transit by from 6 to 36 hours" (R. 16, 17, 596).

Concerning the effect of the proposed consolidation in the matter of lessening or restraining

competition: A duplication of about one-third of the whole existed in the regular routes operated over by the 8 carriers involved and, while the actual competition was less than thereby indicated because of differences in traffic handled and restrictions in the respective operating authorities, nevertheless, the competition, as between carriers included in the consolidation, was substantial (R. 22). As broadly illustrative, the carriers McCarthy and Consolidated were substantially competitive throughout Massachusetts, Connecticut, and Rhode Island, although Consolidated was the only carrier involved which operated between New York City and points in the New England States (R. 23–24). Consolidated and Moran were competitive between the principal points in New York State, the routes of Moran, however, being considerably more extensive than those of Consolidated within New York and also extending to Cleveland, Ohio, and points in northern Pennsylvania which were not served by any of the other carriers involved (R. 26–27). As to those portions of the Middle Atlantic region other than New York, some considerable competition existed between the carriers, Barnwell, Horton, and Southeastern, which operated in that region and over routes extending from points in the South. Competition between these carriers was greatly restricted by differences in their respective operating authorities, but certain of their important

operations were competitive (R. 27–29). And, as to the Southern Region, Southeastern was not competitive with any other carrier involved in the consolidation except to a very limited extent. Barnwell and Horton, however, were competitive in some important operations, which was also true in lesser degree of Transportation (R. 29–30). In short, as above stated, while the competition between the 8 carriers, which would be eliminated by the consolidation proposed, was less than indicated by the one-third duplication in highway mileages, it was, nevertheless, substantial. On the other hand, the competition which would be left was abundant, as afforded by the numerous motor carriers operating over the highways involved and also by rail and water carriers, car-loading and forwarding companies, and other forms of transportation.

Referring to this, the Commission in its report stated that lists before it of motor carriers which operated in the New England region showed 359 carriers of which 103 were Class I carriers (R. 23). Speaking of certain of the principal carriers, it said:

> Adley Express Company, Inc., is authorized to operate as a common carrier of general commodities over a network of regular routes blanketing the States of Connecticut, Massachusetts, and Rhode Island and therefrom to Albany and New York,

> N. Y., and Philadelphia, Pa. It can serve every point in the New England territory served by Consolidated and McCarthy. New England Transportation Company * * * has almost equal coverage in such territory, its routes extending therefrom to New York City and Poughkeepsie, N. Y., * * * Seaboard Freight Lines, Inc., a subsidiary of Keeshin Freight Lines, Inc., conducts operations of the same character over a network of regular routes extending to Syracuse, N. Y., on the west, Fitchburg and Boston, Mass., on the north and east and Washington, D. C., on the south, with service to intermediate and numerous off-route points, including most of the principal points in the region under consideration.

The Commission also referred to an analysis made in an exhibit of record of the motor-carrier competition existing between points of operation in New England of the carriers, McCarthy and Consolidated. This analysis was based on the operation of 294 carriers, including 84 Class I carriers, and showed, among other things, that the number of Class I carriers operating between such points was in no case less than 2 and ranged as high as 32 (R. 24–25). Another exhibit, referred to by the Commission, analyzed the competition afforded by the operations of 76 general commodity carriers, including 39 Class I carriers, between various New England points, on the one

hand, and New York City, Jersey City, Newark, and Philadelphia, on the other. This latter exhibit showed among other things, that 28 Class I carriers operated between Boston and New York City and 8 between Boston and Philadelphia.

As for the extent and strength of the motor-carrier competition that would be left after the consolidation in the Middle Atlantic region, including New York, and in the Southern region, the Commission's review of the evidence showed that the situations would be substantially the same as in the territory served by McCarthy and Consolidated (R. 26–32).

Speaking of the position of the Antitrust Division that the indirect effect of the consolidation was a matter of more concern than the direct elimination of competition between the carriers involved because the consolidated company would be so dominant in the territory that it would be able to restrain the competition of independent motor carriers, the Commission stated that experience with other large motor-carriers systems in the Middle Atlantic and Central regions had not demonstrated that such result would be likely to follow; that in view of the great number of existing motor carriers, the small amount of capital required to enter that transportation field and the advantages that small operators have through intimate relations with shippers and ability to render a more personalized

service, there was little reason to be apprehensive of monopoly at this stage of the development of the trucking industry (R. 33–34). Further in this connection the Commission said (R. 35):

> The large size of a motor carrier which would result from a unification alone does not constitute sufficient ground for denial of an application. Application of such a policy would tend to freeze the motor-carrier industry at its present level. Such transportation, compared with rail and water transportation, is still in its infancy, and arbitrary restrictions upon its natural development into large units solely by reason of comparative size would not be in the public interest. * * *

Following its review of the competitive situation in the territory operated in by the 8 motor carriers, the Commission found that the consolidation would leave ample competitive motor-carrier service through the territory involved, and that in addition competition would be afforded by rail carriers, car-loading and forwarding companies, motor vehicle contract carriers and other forms of transportation (R. 32). It concluded that the consolidation would not result in undue restraint of competition (R. 37).

Issuance of securities

With respect to the application by Associated Transport under the securities section of the Act, the authority sought by the applicant was to issue

securities as follows: (1) Such shares of preferred and common stock as were necessary to consummate its contracts to acquire the capital stocks of the 8 carrier companies and 4 associated noncarrier companies, (2) such further shares of common stock as might be required from time to time in conversion of preferred stock, and (3) 15,000 shares of preferred stock to be sold to the public, the proceeds of which would be used for working capital and other purposes (R. 38).

The applicant had entered into separate contracts with the stockholders of the carrier and noncarrier companies involved whereby it would acquire all outstanding stock of each of those companies,[5] except that with respect to Arrow, it would acquire all of its common and 1,120 of 1,380 shares outstanding, of its preferred stock,[6] and except that with respect to Horton, it would acquire all of its common but none of its preferred stock.[7] The contracts were substantially uniform,

[5] For statement of the purposes and general plan of the consolidation and negotiations, see testimony, Witness Horton, R. 507–516; Witness Seymour, R. 574–580, 590–603.

[6] It was understood that that portion of Arrow's preferred stock not acquired by the applicant would be redeemed either prior to or shortly after completion of the purchase. The agreement respecting Arrow's stock was entered into with The Transport Co. The latter was not owner of the common stock which it undertook to sell, but under agreement with Arrow's common stockholders described in the *Transport Co. case*, *supra*, it had an option to purchase the stock (R. 12, 583).

[7] Horton, in addition to its common stock outstanding, had issued 2,666 shares of $20-par-value employees preferred

the contracting stockholders of each company agreeing to an exchange of their stock as a whole for shares of the capital stock of the applicant as follows: Preferred shares of the applicant having a total par value equal to 80 percent of the net worth, April 30, 1941, of the particular company; and common shares of a total par value equal to an amount obtained by deducting from the company's net profit for the year ended April 30, 1941, a sum[7] equal to 6 percent of the par value of the preferred shares received, and dividing the remainder by two (R. 13).

Net worth and net profit of a company for the purposes of the agreements were determinable in accordance with formulae described therein (R. 13, 576). Special deductions were to be made, however, from the net worth of certain of the companies: From Arrow and Horton, because of the preferred stock of those companies which would not be acquired by the applicant; from Arrow, because of a $12,000 payment which it was obligated to make to cancel an employment

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stock and had received subscriptions for 276 additional shares. Such stock was redeemable at par plus accrued dividends, and it was understood that it would be called for redemption prior to consummation of the proposed transactions (R. 12).

[7] This was subject to the provision that, if any increase in net worth resulted from application of rates of depreciation fixed in the formulae, the vendor stockholders would not receive additional preferred stock, but, instead, common stock of a par value equal to 4 percent of the amount of the increase (R. 13).

agreement with one of its officers; and from Consolidated, because of a $36,000 expenditure made after April 1, 1941, in buying 90 shares of its outstanding stock (R. 12–13).[8] Also, in determining the amounts of stock of the applicant to be exchanged for stock of the respective companies, some special adjustments were made because of situations peculiar to certain of the companies (R. 13).[9]

The applicant's charter authorized issuance of 100,000 shares of $100-par-value preferred stock and 1,000,000 shares of $1-par-value common stock, of which 71,480 shares of common had been issued to provide for organization expenses and for prosecution of the Commission proceedings, 9,000 shares thereof having been delivered to the Transport Company in exchange for engineering and accounting data which had been developed by

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[8] The net worth and net income of the companies, as adjusted, are shown in Appendix C of the Commission's report, which also shows the amounts of the applicant's stock issuable to the stockholders of the respective companies (R. 1458, Ex. 13). For explanation of audit of accounts of companies as a basis for the exchange, see testimony of Witness Reicher, R. 986–1000, 1008 et seq.

[9] A number of restrictions were imposed in the contracts calculated to preserve the assets of the respective companies whose stock would be acquired, such as limitations on salaries, expenditures out of the ordinary, dividend declarations, and the like, and the consummation of each contract was conditioned upon the Commission's approval and also upon the Commissioner of Internal Revenue entering into an agreement that the contemplated transaction constitutes a tax-free reorganization (R. 14, 15).

that company in the earlier *Transport Co. case, supra* (R. 10–11),[11] and the remainder having been subscribed and paid for at par, in part by stockholders of the companies involved and in part by B. M. Seymour, president of the applicant.[12]

The totals of the shares of stock, for issuance of which the applicant required the Commission's authority, were 54,049 of preferred and 860,411 of common stock. These amounts included the 15,000 shares of preferred stock to be sold to the public for cash and 211,768 shares of common to be issued from time to time as necessary for conversion purposes (R. 38–39).[13] The shares to be issued in consummation of the contracts for acquisition of the stocks of the subsidiary companies were 39,049 of preferred and 648,643 of common stock; and of these latter 1,107 shares of preferred and 15,472 shares of common, issuable to Barnwell Warehouse, would be sub-

[11] R. 540.

[12] B. M. Seymour, not being an owner of the stock of any of the companies included in the consolidation, obtained a stock interest in Associated Transport by subscribing for 31,240 shares of the stock so issued for preliminary expenses (R. 519, 557, 575).

[13] At option of the holder, the preferred stock is convertible into common as follows: During first 3 years, 4 of common for 1 of preferred; during second 3 years, 3⅓ common for 1 of preferred; and thereafter, 3 for 1. The preferred stock entitled holders to 6% cumulative dividends, and, in the event of liquidation, to $103 per share plus accumulated dividends before any distribution to holders of common stock (R. 38).

sequently cancelled (R. 38),[14] thus leaving outstanding, as issued against the stocks of the subsidiary companies received by the applicant under the contracts, 37,942 shares of the applicant's preferred and 635,171 shares of its common stock, having a total par value of $4,427,371 (R. 38). As of April 30, 1941, the aggregate net worth of the companies whose stocks were to be acquired was $4,900,245, after adjustments pursuant to the contracts (R. 38; Appendix C to Report, R. 55).[15]

As for the situation that would exist upon actual consolidation of the carrier companies into the applicant, this was shown by a balance sheet statement of the applicant as of June 30, 1941, which was particularly prepared to reflect that situation, including the issuance of all proposed stock and the assumption by applicant of obligation with respect to certain long-term securities of the companies involved. It reflected a capitalization of $7,263,593 comprised of $5,998,-

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[14] Barnwell Warehouse owned, in addition to its other assets, a substantial amount of the stock of Barnwell, and, under the applicant's contract with stockholders of Barnwell, would receive the said 1,107 shares of applicant's preferred and 15,472 shares of its common stock. This stock, it was considered, would be, in effect, reacquired by the applicant in acquiring control of Barnwell Warehouse and was therefore treated as deducted from the total of applicant's shares given in exchange for the stock of Barnwell Warehouse in arriving at the net consideration for the operating assets of that company (R. 14, 38, 1012).

[15] Ex. 12, R. 1427; Ex. 13, 1458; Witness Reicher, R. 1009-1024

851 of capital stock, $867,336 of equipment obligations and $397,406 of other long-term obligations (R. 39–40). The assets supporting such capitalization, including proceeds from sale of the 15,000 of preferred stock, appeared as follows:

Cash	$1,956,858
Material and supplies	667,172
Tangible property	5,140,339
Total	$8,140,429

Commenting on this statement the Commission noted the fact that it showed that the applicant's total assets would exceed its capital liabilities by $876,836.

Following discussion thereof the Commission approved the applicant's proposed issue of 15,000 shares of preferred for sale at par to the public, but subject to the condition that any agreement "by applicant for the sale or underwriting of such stock shall first be submitted to and approved by us" (R. 42–43); and it also approved the other proposed issues of stock, preferred and common, but subject generally to the condition that the applicant's articles of incorporation should be changed so as to provide:

> * * * (1) That holders of its preferred stock, voting separately as a class, in the event of default in payment of dividends upon such preferred stock for two years or more, and until all dividends in arrears on such stock are paid, shall be

> entitled at any stockholders' meeting held for that purpose to elect a majority of applicant's board of directors; and (2) that its common stock shall be without par value.

In imposing the first condition, the Commission stated, in effect, that, while both preferred and common stockholders were entitled to one vote for each share of stock held, the change prescribed would effect a more equitable situation in the event that dividends on the preferred should become in arrears (R. 42) and, in imposing the second condition that the common stock be changed to stock having no par value, the Commission said (R. 41):

> * * * If par-value common stock were issued, as proposed, upon conversion at the highest rate provided, for each share of preferred stock cancelled, par value $100, 4 shares of common, par value $4, would be issued. The difference of $96 presumably would be credited to surplus. Thus, using the foregoing pro forma balance sheet as a basis, if all the preferred stock were converted at that rate, applicant's capital stock account would be reduced from $5,998,851 to $916,419. The balance sheet would then create a misleading impression with respect to original investment. * * *

As for the assumption by applicant of obligation with respect to equipment and other long-term securities of the companies involved, the Commission deferred consideration thereof upon

representation by the applicant that some of these securities would be liquidated prior to actual consolidation and that it would make timely and appropriate application for any authority with respect thereto as might be necessary under section 214 (R. 42).

Following further discussion in its report of the betterments in service and large economies that would be enabled by the consolidation and the fact that the particular consolidation was markedly free from the large promotional and organization fees and other "ills" often accompanying consolidations of common carriers (R. 44),[16] the Commission made its ultimate findings, (1) that the proposed acquisition of control and consolidation upon the modified terms and conditions prescribed was a transaction within the scope of section 5 (2) (a) of the Act, and would be consistent with the public interest; and (2) that the proposed issuance of securities by the applicant was "for a lawful object within its corporate purposes, and compatible with the public interest" etc. (R. 45–46).

The Commission also made findings conferring on the applicant the right upon consummation of the consolidation to continue operations covered by pending "grandfather" applications of the constituent carriers and the right to a certificate covering such operating rights as have already

[16] R. 523, 525, 576.

been granted to those carriers and such as may be thereafter granted in pending "grandfather" proceedings.

2. Proceedings in the lower court

The prayer of the bill of complaint asking for the setting aside of the Commission's authorization of the consolidation of motor carriers and issuance of securities rested upon allegations of invalidity contained in subparagraphs (a) to (i) of paragraph VII of the bill of complaint (R. 6–7). Included among the allegations, there were two which related only to the inclusion of Arrow carrier and which the lower court held, for reasons presently to be given, had been eliminated from the case. Briefly stated, the other, or general, allegations were that the Commission's authorization was founded on an interpretation of the Interstate Commerce Act which was unsound in principle and arbitrary (para. (a)), including an interpretation of section 5, shown "at pages 17 and 18 of the Commission's report" (R. 22), that adopts criteria for the consolidation of motor carriers which are erroneous and will result in restraint of competition (para. (d)); that the authorization was not supported by the necessary findings (para's. (b) and (h)) and that the findings made were not supported by the evidence (para's. (c), (g) and (h)). Dealing with these allegations the lower court held (R. 85–86) that the Commission had not misinterpreted the Act

but, on the contrary, had correctly interpreted it in all respects, that the Commission had made the findings called for and that its findings were supported by adequate evidence (R. 84–85). Accordingly, the Court's decree (R. 89) denied the injunction prayed for and dismissed the bill.

As for the allegations relating to Arrow Carrier, these were to the effect—

> (1) that the Commission had erred in not finding (under sec. 5 (2) (b) of the Act) that the consolidation would enable the railroads with which the applicant would be affiliated to use its motor service to public advantage and would not unduly restrain competition (para. (e)), and
>
> (2) That it had erred in failing to find that the stock interest which would be had by Kuhn Loeb & Co., bankers for two of the largest railroads in the territory involved, would not be in the public interest (par. (f)).

The above two allegations were manifestly directed against that part of the Commission's original order which included Arrow in the authority granted the applicant. The consolidation involved no question of railroad affiliation and there was no contention that it did except the contention of certain interveners predicated upon the inclusion of Arrow and the fact that its stock was to be acquired from a company owned by Kuhn Loeb & Co., which firm had for many years been bankers for the Baltimore & Ohio and the Penn-

sylvania railroads. As shown by an amendment to the Commission's answer (R. 65-67), filed in the case and served on the parties, the contract of the applicant, Associated Transport, for the acquisition of the stock of Arrow was had with the Transport Company (a subsidiary of Kuhn Loeb & Co.) which in turn had an option to purchase the stock under an agreement with Arrow's stockholders. And it is there further shown that, while the Commission's original order of March 16, 1942, included authority with respect to Arrow, the Transport Company failed to exercise its option and make good on its contract with the applicant, in consequence whereof, the applicant petitioned the Commission for modification of its order excluding Arrow therefrom, which petition was granted by order of June 8, 1942 (R. 70–71), reading in part as follows:

> It is ordered, That said petition be, and it is hereby, granted, and so much of said order of March 16, 1942, as authorize[s] applicant to acquire control of and consolidate with Arrow Carrier Corporation and to issue its capital stock for that purpose and for conversion of preferred stock so issued be, and it is hereby, vacated and set aside.
>
> And it is further ordered, That except as expressly modified herein said order of March 16, 1942, shall remain in full force and effect.

Referring to the allegation in the bill with respect to Arrow and the Commission's modifying order, the lower court's opinion reads (R. 85):

> After the suit was brought and the answer of the Commission was filed it was amended to allege, what is now undisputed, that because of the failure to carry through negotiations for the acquisition of the stock of the Arrow Carrier Corporation the applicant petitioned the Commission for a modification of its order to exclude that carrier from the merger authorized and that was done by order entered June 8, 1942. All phases of this controversy which resulted from the inclusion of Arrow in the authorized consolidation are, therefore, eliminated and we will proceed as though Arrow had never been a party.

SUMMARY

I

The lower court did not err in holding that the Commission's modifying order of June 8, 1942, excluding Arrow from the authorization granted by its order of March 16, 1942, eliminated from the case all phases of the controversy resulting from the inclusion of that carrier in the original order. The Commission, upon application by Associated Transport showing that it would be unable to include Arrow in the consolidation and that it was, moreover, no longer desirous of doing so, had by order expressly excluded Arrow from

its original authorization. Following the entry by the Commission of its said modifying order and the due notification thereof given the lower court, the only authorization before the Court was the modified authorization from which Arrow was excluded. In the circumstances it is plain that the Court was without either duty or authority to treat the authorization before it, and which it was asked to enjoin, as one which included Arrow in the consolidation thereby covered. The decisions relied upon by the appellants to show that the lower court's jurisdiction continued for purpose of considering the questions for the guidance of the Commission in the same or similar proceedings have no application to the present case.

II

1. The Commission, in authorizing the proposed consolidation of motor carriers, did not err in holding (R. 22) that it was not the intention of Congress in enacting section 5 that it approve only such transactions as would not result in an "unreasonable" restraint of competition within the meaning of the antitrust laws. Under such an interpretation, the Commission said, the provisions of paragraph (11), expressly relieving the participating carriers from the antitrust laws, would be rendered largely meaningless. The Commission gave to the section its normal construction, that is, that it empowered it to approve

such consolidations as met the statutory standard of consolidations consistent with the public interest. It was of the view that the extent of any restraint of competition that might result was an element to be weighed against the benefits also resulting but only as an element naturally entering into its determination under the Interstate Commerce Act.

Accordingly, proceeding in accordance with such view of the statute the Commission gave full and detailed consideration to the large volume of evidence and testimony introduced bearing both on the lessening of competition that would result from the consolidation and the competition that would remain and also bearing on the contention urged by certain protestants that the applicant, Associated Transport, would be of such size and fianancial strength that it would be able to dominate the other carriers and suppress their competition. Based on the record before it, including tabulated evidence and the testimony of shippers and shipper representatives as well as operating men, the Commission found that, while the lessening of competition would be substantial, there would remain ample motor-carrier competition throughout the territory; that, in addition, all the principal points and many others were served by rail carriers; and that competition was also afforded by contract carriers, by carloading and forwarding companies and other forms of trans-

portation. With respect to the contention that Associated Transport would be of a size enabling it to suppress the competition of other carriers, the Commission stated that its experience with other large motor-carrier systems lead it to believe that no such result would follow, and the Commission also discussed various circumstances and transportation angles bearing this out and made findings thereon supported by evidence or testimony. Concluding that part of its report dealing with competition, the Commission found that the proposed transactions would not result in undue restraint of competition.

2. There is no substance to the appellants' contention that the Commission failed to make the findings required by section 5 (2) (c), which subparagraph provides that the Commission, when passing upon a transaction proposed under section 5, shall give weight to the consideration, among others, of the effect of the proposed transaction on adequate transportation service to the public. Predicated upon this provision the appellants urge that the Commission was authorized to approve a consolidation that substantially lessened competition only as necessary to maintain adequate transportation service for the public and only if it finds that existing service is inadequate.

The appellants emphasize their view of the importance of this latter finding as a prerequisite

to the approval of a consolidation that would ensure for the public what they term "future" improvements and betterments in service by stating that the said existing service rendered the public must be "clearly inadequate" and shown to be such by "present existing facts that may be examined." It is apparent from this that the appellants' "reading" of Congress' purpose to ensure, or maintain, an adequate transportation service for the public is one that places unwarranted stress on the maintaining of a transportation service that might be considered adequate based on a standard of adequacy judged and determined by existing transportation service and excluding the improvements and betterments that could be achieved through a consolidation of carriers. But the fact that Congress' purpose to ensure an adequate transportation service was not a purpose to ensure, or maintain, for the public a transportation service of such qualified adequacy, is shown by the obvious fact that the phrase "adequate transportation service to the public" incorporated into section 5 (2) (c) by the 1940 amendments to the Act was adopted from the familiar policy of Transportation Act, 1920, to ensure an adequate transportation service for the public. This policy has been discussed and explained by many decisions of this Court, including decisions construing and applying it directly to the provisions of section 5. The deci-

sion in *Texas* v. *United States*, 292 U. S. 522, was such a decision and this Court, there referring to the amendments made to section 5 by Emergency Transportation Act, 1933, said that these enlarging provisions strengthened and carried forward the policy and purposes of Transportation Act, 1920; and, in applying those purposes to the standard of "the public interest" furnished by section 5 for Commission guidance, it said that phrase—

> has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *New York Central Securities Corp.* v. *United States, supra.*

The fact that the conditions of economy and efficiency and best use of transportation facilities are essential to the adequate transportation service which it is the purpose of section 5 to maintain shows that purpose it not restricted to the maintaining for the public of a transportation service of the limited adequacy suggested by the appellants.

3. Certain of the appellants' allegations and certain of their argument convey the initial impression that it is their position that, while under the 1940 amendments to section 5, the authorizations of rail and other Part I carrier consolidations continue to be governed by the standards and criteria embodied in the policy of Transportation

Act, 1920, this is not so with respect to consolidations of motor carriers but that the authorizations of such consolidations are governed by special standards and criteria embodying the restrictive policies of the antitrust laws. Closer study of their argument shows that this is not the intended meaning but that, instead, it is their contention in substance that Congress, when enacting the Motor Carrier Act of 1935 and providing therein for motor carrier consolidations, adopted standards and criteria different from those governing authorizations with respect to rail carriers under section 5 and reverting to the restrictive aims and policies of the antitrust laws; and that, since (so they assert) the 1940 amendments, by which the matter of consolidation of rail, motor, and water carriers were all covered by section 5, practically adopted the provisions of the Motor Carrier Act governing motor carrier consolidations, it follows that Congress intended that the consolidations of all carriers subject to the Act should be governed by the standards and criteria, reverting to the restrictive policies of the antitrust laws.

The principal flaw in the above argument of appellants is that they are mistaken in their belief that Congress, when enacting the Motor Carrier Act of 1935 and providing for motor carrier consolidations did so by provisions specially intended for motor carriers; for the provisions in question contained in that Act follow closely the provisions

of section 5 as amended by Emergency Transportation Act, 1933, except the provisions then contained in that section but eliminated in 1940 for a plan of consolidation of the railroads. It is apparent, therefore, that those provisions in section 5, as amended in 1940, which the appellants consider were taken from the Motor Carrier Act, 1935, should be considered rather as provisions which were already in section 5, as that section was amended by Emergency Transportation Act, 1933, and which, as stated in *Texas* v. *United States, supra*, strengthened and carried forward the policy of Transportation Act, 1920, together with its standards and criteria governing the consolidations of carriers.

4. The appellants' contention that the Commission is authorized to approve consolidations only after giving due consideration and weight to the provisions and policies of the antitrust laws is not substantially different, in the application made of it, from their contentions as to the specific things required of the Commission by the antitrust laws, or from the contention of protestants in the Commission proceeding "that it was the intention of Congress, in enacting section 5, that (the Commission) approve only such transactions as would not result in an 'unreasonable' restraint of competition within the meaning of the antitrust laws." One marked illustration of this is the special reliance the appellants place on the Sherman Act for support of their contentions.

The appellants' brief refers to the Sherman Act by name and bases upon it that part of their argument intended to show that, with the enactment of the 1940 amendments to the Act, Congress restored the original section 5 policy with respect to competition which it is asserted was later embodied in the Sherman Act (Br. 18–19). Further pursuing this argument, the brief contends that section 5 should be construed as requiring the Commission to be guided by, and to give effect to, the policy and provisions of that Act which procedure, it is said, might well be regarded as a more effective means of ensuring compliance therewith than the enforcement remedies available to the Department of Justice, since section 5 requires prior administrative approval before a consolidation can be effected. This argument leaves no "room" for escape from the conclusion that it is the appellants' position in practical effect that the Commission is required to administer and apply the prohibitions of the Sherman Act.

However, the Sherman Act is not placed with the Commission for administering but is expressly committed to the courts, and while, as in effect suggested by the lower court, the appellants' description of that Act as prohibiting "unreasonable" restraints of competition carries the import that only those restraints which may, in light of the surrounding circumstances, be held to be unreasonable, are the restraints in fact for-

bidden, nevertheless it is, of course, the fact that what would be unreasonable restraint under the Sherman Act, whose single purpose is directed to the preservation of competitive forces and which expresses that purpose in terms of prohibition carrying criminal penalties, cannot be regarded as affording a standard of the extent to which the forces of competition were intended to be preserved under an Act (the I. C. Act) which, in order to advance its own aims and purposes, expressly provides for the consolidation of carriers into a single company and expressly relieves the carriers concerned from the said Sherman Act and other Acts so far as necessary to avail themselves of the authorization.

5. The appellants' contentions, whether those urging that the Commission is required to give weight to the policies and provisions of the antitrust laws or those in fact urging that it is governed by those laws, are in conflict with the language of the Act and the decisions applying it from time of enactment. The Congress with full realization, it must be assumed, that the legislation was not in line with the prohibitions of the antitrust laws, nevertheless expressly provided in section 5 for authorization of consolidations of carriers subject to regulation under the Interstate Commerce Act and, at the same time removed the obstacle presented by said prohibitions by adding a provision expressly

granting relief therefrom. *N. Y. Cent. Securities Corp.* v. *United States,* 287 U. S. 12, 25–26. If the provision for such relief had not been included, it still would seem that it would have had to be implied from the power and duty placed with the Commission and with the provision expressly included, there is no room for the appellants' argument that the Commission is required to give weight to the policies and provisions of the antitrust laws or their in fact argument that it is expected to actually administer those laws in passing upon transactions under section 5.

ARGUMENT

I. The appellants' allegation that the lower court erred in its holdings with respect to the elimination of all issues relating to Arrow carrier is without substance

As above pointed out, the bill filed in the lower court contained two allegations raising issues which related only to the inclusion of Arrow in the Commission's authorization of the consolidation of motor carriers and issuance of securities and which the court held (R. 85) had been eliminated from the case by the Commission's modifying order of June 8, 1942, excluding Arrow from its said authorization. These allegations were to the effect—

> (1) that the Commission had erred in not finding (under sec. 5 (2) (b) of the Act) that the consolidation would enable the railroads with which the applicant

would be affiliated to use its motor service to public advantage and would not unduly restrain competition (para. (e)), and

(2) that it had erred in failing to find that the stock interest which would be had by Kuhn Loeb & Co., bankers for two of the largest railroads in the territory involved, would not be in the public interest (para. (f)).

In the Commission proceeding the only contentions made as to railroad affiliation were advanced in connection with the inclusion of Arrow in the proposed consolidation and these contentions were predicated on the fact that the acquisition of Arrow's stock in exchange for stock of Associated Transport was contracted for with a company owned by Kuhn Loeb & Company, which firm had for many years been bankers for the Baltimore & Ohio and the Pennsylvania railroads. The Commission in its report (R. 35–37) dealt at some length with these contentions and by its discussion, there and at other places in the report, it is shown that the proposed consolidation was sponsored not by Kuhn Loeb & Company, as contended by the protestants, but by the individuals owning the stock of, and actually managing, the carriers involved; that there had been a previous proposed unification including the carriers here involved and about 20 others which the Commission had declined to approve in what is known as the *Transport Company case*, 36 M. C. C. 61;

that it was through its subsidiary, the Transport Company, that Kuhn Loeb & Company had first gotten and continued to hold, its option to purchase the stock of Arrow (R. 12); that, under the contract for the exchange of the optioned stock of Arrow for stock of Associated Transport, the stock of the latter which Kuhn Loeb & Company would indirectly acquire, if the proposed consolidation were consummated, would amount to 13 and 9.53 percent, respectively, of the preferred and common stock of the said Associated Transport; that Kuhn Loeb & Company would have only one of nine directors on the board of Associated Transport and its inexperience in the motor carrier industry, contrasted with the experience of the other directors, made it improbable that it would have more than a nominal voice in the formulation of operating policies; and that the fact that no railroad had intervened in opposition to the application was not, as argued by the protestants, a circumstance which could be properly considered as supporting their contentions that Associated Transport would be railroad affiliated. In conclusion, the Commission said (R. 37):

> * * * The circumstances present here are not such as to make it reasonable to believe that the affairs of applicant would be managed in the interest of any railroad, and we conclude that applicant is not and would not be affiliated with a railroad as a result of consummation of these transac-

tions as proposed. Compare Cleveland, Columbus & Cin. Highway, Inc.—Purchase—Reo, 36 M. C. C. 325, and National Freight Lines, Inc.—Purchase—Mason, 15 M. C. C. 687.

That the Commission's above conclusion was both rational and sound seems inescapable. However, entirely aside from this, the situation which was in fact before the lower court was that resulting from the failure of the Transport Company to exercise its option to purchase the capital stock of Arrow and its consequent failure to deliver that stock to Associated Transport and to receive in exchange the shares of stock of the latter company agreed upon. As a result of that failure, Associated Transport applied to, and obtained from, the Commission an order conforming the Commission's authorization to the fact that Arrow would not be included in the transactions authorized and, since the order was entered after the court suit had been instituted and after the Commission had filed its answer, the Commission filed an amendment to its answer (R. 65), advising the court of the modification of the authorization and attaching thereto a certified copy of the order of modification (R. 70). Referring to the above, the lower court stated and held in its opinion (R. 85):

> After the suit was brought and the answer of the Commission was filed it was amended to allege, what is now undisputed,

> that because of the failure to carry through negotiations for the acquisition of the stock of the Arrow Carrier Corporation the applicant petitioned the Commission for a modification of its order to exclude that carrier from the merger authorized and that was done by order entered June 8, 1942. All phases of this controversy which resulted from the inclusion of Arrow in the authorized consolidation are, therefore, eliminated and we will proceed as though Arrow had never been a party.

In their assignments of error and in their brief, the appellants allege (Br. 59–62)[17] that the lower court erred in the above holding and in failing to pass on the important public questions arising under the proviso of Section 5 (2) (b) of the Act, which latter reads as follows:

> *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the

[17] Since the briefs of the appellant, McLean, and the appellant, American Farm Bureau Federation, adopt the brief of the Secretary of Agriculture except for certain additional argument, the said brief of the Secretary of Agriculture will be referred to as the appellants' brief and, whenever the other briefs are referred to, that will be done by special designation.

> transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

For "the important public questions arising under" the above, the appellants make reference (Br. 62) to the questions dealt with in Section III–B of their brief, but, from a reading of that section of their brief, it is not clear why the contentions there made could not have been fully considered by the lower court from the standpoint of the Commission's authorization as it in fact existed, that is, without assuming that it still included Arrow in the transactions which Associated Transport was authorized to consummate. The most that was eliminated from the case was the court's review of the Commission's conclusions that (with Arrow included in the transaction) "the circumstances present here are not such as to make it reasonable to believe that the affairs of applicant would be managed in the interest of any railroad and we conclude that applicant is not and would not be affiliated with a railroad as a result," etc. Whatever the public importance of the question as to what constitutes railroad affiliation, it will be seen that the Commission's conclusions cover only the ground of the facts and circumstances before it.

In support of their contention that the lower court should have proceeded to review the Com-

mission's conclusions, although not involved in the authorization as modified by the Commission, the appellants say (Br. 61):

> The courts have consistently held that where questions of public interest are concerned, and where the interpretation of a statute by a commission or similar body under conditions which may be repeated is challenged, the court's jurisdiction continues for the purpose of considering these questions for the guidance of the Commission in the same or similar proceedings.

The above seems to state a rule to the effect that whenever there is challenged in court a determination by the Commission of public interest and involving interpretation of a statute under conditions which may be repeated, the court's jurisdiction continues for purpose of guidance of the Commission in the same or similar proceedings, despite subsequent happenings or action of the Commission removing the question determined from any controversy before the Court. It will be noted that the decisions cited by the appellants as authority are not many, and it seems apparent that those named do not support the broad application given them but that each depends upon circumstances quite different from those in the instant case. Cf. *United States et al.* v. *Anchor Coal Co. et al.*, 279 U. S. 812,[18] and cases

[18] The Commission decision in this case involved interpretation of the statute and was of public importance (25 Fed. (2d) 462, 464, 469).

therein cited. Here the removal of the issues from the controversy before the Court was because of express order of the Commission modifying and cutting down the previous authorization granted. The application of Associated Transport (R. 67) and the recitals in the Commission's order (R. 70) show that there was no likelihood that Arrow would be restored to its former place in the Commission's authorization, and, so far as future similar situations are concerned, any value that would attach to court review of the Commission's conclusion that the applicant, Associated Transport, was not railroad affiliated, would seem to be minor except as to situations of very close similarity of facts and circumstances. Indeed, it is not at all clear that the above quoted statement of the appellants with respect to Commission decisions involving interpretation of the statute has any application to the present case for the reason that it seems likely at least that the question of railroad affiliation is for administrative determination. It appears to be committed to the Commission (sec. 5 (6) and (7); Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125; *Shields* v. *Utah-Idaho Ry.*, 305 U. S. 177) and it is a question depending particularly upon the facts and circumstances involved.

It should be mentioned that the appellants rely to some extent on the fact that, even though Kuhn

Loeb & Company acquired no stock of Associated Transport through exchange of the stock of Arrow, it still was indirect owner of 9,000 shares of the common stock of Associated Transport which was issued to it for certain engineering and accounting data which had been used in the earlier *Transport Co. Case, supra,* and which Associated Transport had need for in the later case (Br. 8, 60). In connection with this ownership of stock the appellants state (Br. 61):

> * * * If the motor carriers here involved are merged into one company, as proposed, Kuhn Loeb & Company can proceed, under the Commission's ruling that it is not affiliated with any railroad, to increase its stock holdings in Associated Transport, Inc., to full control without Commission interference.

Aside from the soundness of the above proposition generally, it will have been seen that the Commission did not hold that Kuhn Loeb & Company was not affiliated with any railroad.

In the brief of the American Farm Bureau an additional argument is made to support the contention that the lower court should have passed upon the issues arising from the inclusion of Arrow in the original authorization although Arrow was excluded from the authorization by the Commission's modifying order. Referring to the lower court's statement that, by reason of the Commission's modifying order all issues arising

from the fact that Arrow was included in the original authorization were eliminated from the controversy, the brief of the said Farm Bureau reads (pp. 16–17):

> * * * However, the time allowed by the Commission for carrying the consolidation into effect had not then expired. The Commission by its original order and by the supplemental order had indicated that it would approve the consolidation and merger either with or without the inclusion of Arrow Carrier Corporation.

The above statement does not accurately reflect either the terms or the effect of the orders referred to. The orders should, of course, be read in connection with the Commission's report, and the Commission had said (R. 12) that, if the parties were unable to include Arrow the consolidation might, nevertheless, be consummated in other respects without further authority. Accordingly, the original order not only indicated that the Commission would authorize, but actually authorized the unification and consolidation either with or without the inclusion of Arrow. But the Commission's subsequent order cannot be logically read as embodying the statement in the report just referred to, that is to say, the said subsequent order, expressly excluding Arrow from the unification and consolidation authorized, cannot be read either as authorizing or as indicating that the Commission would authorize the transactions

whether or not Arrow was included. The order was, of course, made on application of Associated Transport but neither the application nor the recitals in the order indicate any likelihood even that the Commission would ever be asked to restore Arrow in its authorization. On the contrary the application and the said recitals show both that the agreement for acquisition of Arrow's stock had been cancelled and that Associated Transport no longer either intended or desired to include Arrow in the unification and consolidation. And, in any event, it is manifest that the lower court could not speculate either as to the possibility of another application being made to the Commission or as to what action the Commission would take in the event such application were made. The order of authorization before it excluded Arrow and it is plain that the court did not err in failing to treat it as an order different from what it was.

Possibly the appellant Farm Bureau, in stating that the order indicated that the Commission would approve the consolidation either with or without the inclusion of Arrow had reference to the report instead of the order and to the fact that the report's findings continued as formerly to contemplate the inclusion of Arrow, but it is, of course, settled that a report's findings cannot be subjected to suit to enjoin and set aside in the absence of an order giving effect thereto. *United*

States v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528.

II. The Commission, in approving the consolidation, proceeded under a correct construction of Section 5 of the Act

1. The Commission was correct in its view that the provision of Section 5, which accords relief from the Antitrust Acts with respect to consolidations approved by it, may not be read as intending that only such consolidations be approved as are not forbidden by the said Acts

The appellants' claim of invalidity of the Commission's orders authorizing the unifications and consolidation of carriers here involved rests, it is clear, for the most part on the legal contention that the Commission acted under a misconception of section 5 of the Interstate Commerce Act and particularly its provisions in paragraph (11) with respect to relief from the antitrust laws (R. 14, 33–36). While the appellants' allegations include allegations of inadequacy of findings and supporting evidence, these, as will be later shown, do not so much assert such inadequacy in respect of the criteria recognized by the Commission as governing under the Interstate Commerce Act as they allege lack of the findings and evidence which the appellants insist were necessary, that is, the findings and evidence necessary to establish the consolidation as one permissible under the appellants' view that section 5 required the Commission to apply and give effect to the antitrust laws (R. 33).

Although the appellants rely principally on their contention that the Commission acted under a misconception of section 5, it should be noted that their brief contains little, if any, detailed discussion of the terms of the section. In fact, the argument in the brief intended to show that section 5 required the Commission to apply and give effect to the antitrust laws starts out with an extensive discussion (Br. 15–33) of the legislative history of the section and its amendments and of the antitrust laws without either pointing to any language in the section as it now stands indicating such a requirement or pointing out in just what respects its language was considered to be ambiguous.

As has been shown in the preliminary statement, the Commission is empowered under section 5 (2) (b) of the Interstate Commerce Act to approve unifications and consolidations of carriers subject to its jurisdiction upon findings that "the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest"; and its said approval operates to relieve the carriers participating in a consolidation from the antitrust laws and all other restraints or prohibitions of law, as provided in section 5 (11) of the Act, which reads in part as follows:

> The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or

> resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved from the operation of the antitrust laws,* and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *. [Emphasis supplied.]

The appellants' contention that the Commission, in authorizing the consolidation of motor carriers involved, proceeded under an erroneous conception of section 5, is made in various ways, but, as will be later shown, the several arguments urged by the appellants all appear to rest basically on the proposition that the Commission had erred in ruling against the contention, advanced in the proceeding, that the authority given to it to approve consolidations extended only to such consolidations as would not result in an "unreasonable" restraint of competition within the meaning of the antitrust laws. In the bill of

complaint herein (R. 1, 7), similarly as in the petition for rehearing (R. 475, 481) filed with the Commission, pages 17 and 18 of the Commission's report are referred to as showing the particulars in which the Commission was considered to have misconstrued the Act; and the appellants' brief also refers to the same portion of the Commission's report in its statement (Br. 33–34) that—

> The Commission construed Paragraph 11 of Section 5 as placing wholly within its hands, regardless of and unfettered by the provisions and policies embodied in the antitrust laws, the power to grant or deny mergers of motor carriers. The Commission's claim to such power is stated as follows (R. 22):
>
> "In our opinion, the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under Section 5."

At the said pages of its report (R. 22–23) referred to the Commission expressed its disagreement with the argument of the Antitrust Division that it was the intention of Congress, in enacting section 5, that it approve only such transactions as would not result in an "unreasonable" restraint of competition within the meaning of the antitrust laws, regardless of benefits that might result or the adequacy of remaining competition. The Commission said that—

> Under such an interpretation, the provisions of paragraph (11) of section 5 would be largely meaningless.

and it further said that—

> * * * In our opinion the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under section 5. The specific reference to the antitrust laws only emphasizes the Congressional intent that we should be empowered to approve transactions which otherwise would be violative of the antitrust laws, if we are convinced that the public interest would thus be best served. Stated differently, section 5 authorizes us to permit unifications which would, except for such approval, result in restraining competition contrary to the antitrust laws, where the disadvantages of such restraint are overcome by other advantages in the public interest, such as direct betterment in the public service of the carriers or indirect betterment through stabilization of the industry. Determination of the larger question as to whether the proposed unification would be consistent with the public interest involves consideration not only of the competition that would be eliminated, but also of the competition that would remain, and advantages which would result from the unification. * * *

In short, the Commission was unable to accept a construction of section 5, whereunder para-

graph (11) thereof would have to be taken, not as a provision according relief from the antitrust laws with respect to consolidations approved by it, but as a provision limiting its approvals to such consolidations as are not forbidden by those laws. The Commission gave to the section its normal construction, that is, that it empowered it to approve such consolidations as it determined met the statutory standard of consolidations consistent with the public interest. It considered that the extent of any restraint of competition that might result was an underlying element entering into such determination, but it did not consider that section 5 had adopted, as the ultimate criterion (i. e., the standard) of permissible consolidations, such consolidations as would not result in an "unreasonable" restraint of competition within the sense and meaning of those prohibiting laws.

Accordingly, the Commission, proceeding in the view that the standard of a permissible consolidation set up by section 5 of the Interstate Commerce Act was one which would be consistent with the public interest as judged by the criteria furnished by that Act, gave such consideration to the element of restraint of competition as was required to properly weigh, in the light of such criteria, any detriment to the public interest that might result therefrom against the benefits and advantages derived from the consolidation. As

shown in the Commission's report (R. 22–25), a considerably duplication existed in the regular routes operated over by the 8 carriers included in the proposed consolidation. The carriers, McCarthy and Consolidated, were substantially competitive throughout Massachusetts, Connecticut, and Rhode Island, although Consolidated was the only carrier involved which operated between New York City and points in the New England States. Consolidated and Moran were competitive between the principal points in New York State, the routes of Moran, however, being considerably more extensive than those of Consolidated within New York State and also extending to Cleveland, Ohio, and points in northern Pennsylvania (R. 27–28). As for the Middle Atlantic region other than New York, and the Southern region, the routes of those of the carriers operating therein also involved considerable "overlaps", although less so than those of the carriers operating in New York and the New England States (R. 27, 29).

The amount of duplicating highway mileage of the carriers involved in the proposed consolidation did not constitute an entirely accurate measure of the actual competition existing between them, this because of differences in traffic handled and restrictions in their respective operating authorities (R. 22, 28, 29). Nevertheless, the competition that existed between certain of the carriers involved was undoubtedly substantial, and

consummation of the proposed consolidation would eliminate such competition. But it is plain that this fact could not be considered as controlling in view of the record showing of the abundance of competition that would remain (R. 22–32).[19] Speaking of the tabulated evidence, the Commission found that "there would remain ample competitive motor carrier service throughout the territory involved"; and it further found that "in addition, all the principal points and many others are served by one or more rail carriers"; that competition is also afforded by motor vehicle contract carriers, by carloading and forwarding companies and frequently by combinations of two or more carriers through interchange (R. 32).

Judged, however, by the argument advanced before the Commission as well as in their briefs filed here (R. 44, 45), the appellants' first concern is not because of the direct elimination of competition between the carriers involved in the consolidation but because of the possible indirect effect of the consolidation upon the remaining operators, their objections in this respect being in part that the "size" and financial strength of the resulting carrier would enable it to dominate the other carriers and in part seeming to be based

[19] R. 707, 734; Ex. 3, R. 1381; Ex. 6, R. 1394; Witness Howell, R. 965–982; Ex. 4, R. 1389; Ex. 16, R. 1475; Ex. 19, R. 1484; Ex. 20, R. 1489.

on the premise that the Commission was without authority to approve the consolidation, because as to certain of its possible operations, particularly those between extreme termini, Associated Transport would have a monopoly of the service in the sense that it would be the only single motor carrier authorized to conduct the operations. In the Commission proceeding this latter contention was urged, using as particularly illustrative the possible operations between Boston and New Orleans; and, in answering it, the Commission said (R. 33):

> * * * The evidence shows that service between these extreme termini (Boston and New Orleans) is not contemplated by applicant, nor would it be economically feasible under present conditions and rate structures, particularly because of the availability of substantially cheaper water transportation. However, assuming such service were to be rendered by applicant, the mere fact that the consolidation would result in making available to the public a new service, different from any presently existing, may not properly be objected to on the ground that applicant would have a "monopoly" of such service. If such contention were valid we would be required to disapprove many applications, both under section 5 and section 207, for extension of operations to points not already enjoying similar service, on the ground that such an applicant, being the only operator, would have a monopoly of such service.

Here, of course, the plaintiff's objection runs flatly counter to the criterion of "the public interest" which the Commission must observe in passing upon proposed unifications, or consolidations, and the criterion of "the public convenience and necessity" which it must observe in passing upon proposed extensions of, or proposed new, operations. It is a matter of common knowledge that competitive conditions in the transportation field have forced and are continuing to force on the railroads countrywide abandonments of so-called "weak" branch and other lines, and that the intense competition between the motor carriers themselves has created unsound conditions in the industry. It was the pressure of these very conconditions which induced Congress to enact the Motor Carrier Act, 1935.[20] Where the traffic furnished by communities served by a line of railroad does not warrant its continued operation, the Commission has no choice other than to permit of its abandonment. *Colorado* v. *United States*, 271 U. S. 153. Such abandonments generally leave more than one motor carrier operating but they may leave a community without service at all[21] and, of course, there are still many com-

[20] The conditions resulting from the intense competition in the transportation field had been the occasion for study by Congress under various proposed bills for ten years or more.

[21] The competition that causes abandonment of a line need not be direct competition of motor carriers with the line. A greatly contributing cause is the effect of motor competition

munities without direct or any adequate form of transportation, to which motor carriers are from time to time proposing to extend their service. Plainly, in the case of a carrier applying to the Commission for authority to undertake service to such a community, it would not be in the interest of the community to be deprived of the service in order that it be protected from the carrier's having a monopoly in the rendering thereof.[22]

Moreover, the assumption that Associated Transport would, as to certain of its long-haul operations, have a monopoly of the transportation service, does not square with the facts. The Commission, referring to the Boston to New Orleans operations, in effect stated that the com-

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on railroad revenue generally which does not long permit of continued operation of unprofitable lines either for further trial or other reason. A frequent immediate cause of abandonment is the falling off of traffic from the industry for which a line was chiefly built, although there will generally have grown up in reliance on its service other small industry, farming, or other permanent settlement.

[22] It should be noted that the decision in *Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U. S. 266, 277 (to be later discussed), shows plainly that the Act considers that the public interest may be promoted by protecting a carrier in its monopoly in rendering service; for there the Texas & Pacific had such a monopoly (e. g., its "spur" extending into the industrial section of Dallas) and it was held that, before the Santa Fe could undertake competitive service, it must obtain a certificate of public convenience and necessity, the Court saying "that competition between carriers may result in harm to the public as well as benefit; and that when a railroad inflicts injury on its rival, it may be the public which ultimately bears the loss."

petition was such (particularly that in the form of the cheaper water transportation) as to render the operations economically impractical under present conditions and rate structure (R. 33), And, in its findings in respect of competition other than that afforded by motor carriers, it said, among other things, that all of the principal points and many others are served by one or more rail carriers (R. 32).[23]

With respect to the contention, made before the Commission as well as here (R. 44–46) that the consolidated company would, because of its size and revenues, be able to dominate and suppress the competition of the other motor carriers operating in the territory, the Commission referred to a number of other large motor carrier systems operating in the Middle Atlantic and Central States (mentioning by name the Keeshin System, Interstate Motor Freight System and United States Truck Line System) and said that experience with them had not indicated that such result, or anything approaching a monopoly, would be likely to follow;[24] that, considering the

[23] Ex. 18, R. 1481. Witness Mead, R. 1145 et seq.; Witness Arbour, rail and water competition, R. 707–709; Witness Faivre, R. 831; Witness Vayo, R. 888.

[24] The record of testimony contains frequent mention and discussion of the operations of the systems named and other large systems (R. 597–598; 1152–55; 1165–67; 704–706; 812; 857–858; 979; 1056; 1154; 661–66), including testimony to the effect that, since such large systems, established in east-west operations, had been successful and beneficial to shippers, the proposed consolidation of north-south operations could

great number of motor carriers operating,[25] the small amount of capital required to enter the business, the advantages which the smaller motor carriers have through their more intimate relations with shippers and ability to render a personalized service,[26] it seemed that monopoly was little to be feared at this stage of the development of the trucking industry; that, as to the ability of the consolidated company to obtain a greater portion of the available traffic than the present individual carriers now handle, the testimony of shipper representatives showed that there was a tendency among shippers to divide their traffic[27] and that, in the opinion of the general manager of one of the intervening motor carrier competitors of Horton and Barnwell, his company would be in a better position from the solicitation standpoint if those carriers were

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be expected to be equally successful and beneficial (R. 890–891; 858–860; 596–597; 513; 922). As to the proposed Associated Transport consolidation, there was a very full record of testimony of shippers and shipper representatives, as well as operating men, as to the benefits that would result, and also its effect on the competitive situation. There was much opinion testimony (with reasons given) that monopoly would not, and, indeed, that it could not, result from the consolidation (R. 898; 822; 904; 664–670; 907).

[25] Witness Tupper, R. 898–899; Stevens, R. 904; Rettino, R. 920; Kirtley, R. 927; Glymp, R. 940; Hooey, R. 811.

[26] Witness Horton, R. 567; Altwater, R. 859; Howell, R. 970–975.

[27] Witness Faivre, R. 826; Greer, R. 838; Evans, R. 882; Tupper, R. 893; Davis, R. 912; Glymp, R. 940.

merged (R. 34).[28] The Commission also discussed, and showed to be based on faulty premises, argument advanced that the combined volume of business of the constituent carriers would give the consolidated company a bargaining power with connecting motor carriers that would enable it to demand a disproportionate amount of interchange traffic.[29] Such bargaining power, the Commission said, "would necessarily have to be spread among numerous connecting lines and in the aggregate would be no more, and probably would be less, than that of competing lines."[30] The applicant, it further said, "would have little to gain and much to lose by adopting an unreasonable policy of interchange" (R. 34).

The Commission recognized, of course, that Associated Transport would haul unrouted freight to destination when possible to do so; that is, that it would not short-haul itself, but, in this connection it said (R. 34):

> However, the traffic it might divert from connecting carriers probably would be equalized, to a large degree at least, by traffic which would be diverted from it to other lines. To illustrate, a carrier oper-

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[28] R. 1280.

[29] Witness Arbour, R. 695; Hooey, R. 812; Faivre, R. 822; Barnwell, R. 958; Clay, R. 634; Brock, R. 688-699.

[30] Akers, R. 1267-1268, 1278-1281; Smith, R. 1243, 1246-1247; Lewis, R. 1260-1263; Dempsey, R. 1238-1240; Barnwell, R. 958-959; Horton, R. 543; Clay, R. 634; Ackerman, R. 763.

> ating between Boston and New York and presently interchanging with Barnwell at the latter point for southern destinations, after consummation of the proposed consolidation, would be likely to deliver traffic controlled by it to some independent line rather than to applicant, which would be a competitor of such delivering carrier.[31]

The above weighing by the Commission of the contentions of the protestants, it will be observed, was a weighing from the standpoint of criteria supplied by the Interstate Commerce Act and not from the standpoint of what would, or would not, constitute restraint of competition forbidden by the antitrust acts. The Commission was of the view that there was no reason to apprehend that Associated Transport would be able to dominate the field, or, in fact, secure a disproportionate share of the traffic, and it further, in effect, stated that, if it was to consider that the size alone[32] of a motor carrier that would result from

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[31] Witness Dempsey, R. 1238–1239, 1236–1237. And see testimony to the effect that there would be no lessening of interchange except where the consolidation rendered it no longer necessary. Horton, R. 524; Arbour, R. 695; Ackerman, R. 763; Barnwell, R. 958–959; Dempsey, R. 1221, 1224.

[32] In the earlier *Transport Case*, 36 I. C. C. 61, involving the unification of 29 motor carriers, the Commission's decision, denying the application, was based on several grounds, certain of which were attributable to, or related to, size, but much in addition to size entered into the decision. In the instant report (p. 46) the Commission said: "The carriers involved in the prior case, but not in the present one, alone

a consolidation was, under the Interstate Commerce Act, a sufficient ground for denial of an application, "such a policy would tend to freeze the motor-carrier industry at its present level," and that—

> * * * There are many thousands of motor carriers of property subject to our jurisdiction. Many of these are very small, and small motor carriers are necessary and have a definite place in the industry. On the other hand, it would seem that larger motor-carrier systems, comparable in size and strength with units of competing forms of transportation, should also have their place in the industry.[33] The legislative history of section 5 indicates a clear Congressional intent to encourage unifications, particularly of railroads. In view of the national transportation policy, as declared in the act, it can not be supposed that Congress intended that the motor-carrier industry, a coordinate and competing form of transportation, should not also be permitted to grow through consolidations, or that the mere size of the consolidated company should, of itself, be sufficient to warrant denial. * * * (R. 35).[34]

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would furnish substantial competition to applicant throughout much of the territory involved" (R. 44).

[33] Witness Vayo, R. 889–890; Altwater, R. 859–860; Howell, 975; Rettino, R. 922.

[34] Earlier the Commission had said (R. 18) that "among other things, the act declares it to be the national transportation policy to promote safe, adequate, economical, and effi-

As has been above shown, the Commission had gone very fully into the considerations other than that of "mere size" alone and was very firmly of the view that the advantages of the consolidation greatly outweighed the disadvantages urged; and further in connection with the matter of size, it must not be overlooked that the highway mileage operated over by a motor carrier does not reflect its "size" in the same terms of measurement as does the mileage of privately owned right-of-way operated by a railroad. The appellants center attention largely on the long-haul operations which will be facilitated by the consolidation, but the business of the consolidated operations will continue to be spread between short-haul, medium-haul and long-haul operations (R. 516, 523), and while, with the improved facilities and faster service, the long haul proportion of the traffic may be definitely expected to increase, the proposed consolidation was quite as much for the purpose of improving the short-haul as the long-haul service rendered the public (R. 714, 713). In any event the showing of competitive motor carrier service included, not alone very many class 1 carriers, but also many having very extensive territorial operating authority or performing long-haul operations through interchange arrangements[35]; and,

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cient service.'" The evidence showed that each of these purposes would be served by the consolidation.

[35] R. 24, 26, 29, 30, 31; Witness Hester, R. 789, 795; Hooey, R. 805–806, 808–809; Fairve, R. 816–818; Akers, R. 1267, 1281.

throughout, the record is replete with evidence and testimony of the rail competition[36] that will be met with and also that of the carloading companies, the water and contract carriers and other forms of competitive transportation.[37]

In short, the record contains ample evidence on every angle of the situation and, as stated by the Commission, the question as to whether a proposed consolidation is consistent with the public interest is committed to its judgment as a matter governed by criteria furnished by the Interstate Commerce Act (*Texas* v. *United States*, 292 U. S. 522) and not by the Antitrust Acts. This construction given by the Commission to the Act which it administers (Cf. *N. Y. Central Securities Corp.* v. *United States*, 287 U. S. 12, 24) is not alone its only normal and workable construction and one long administratively applied, but is also a "reading" required by the plain language of the section involved (idem, 26), and that being the case, the appellants resort to extraneous considerations to find warrant for a different construction of the language falls

[36] Ex. 18, R. 1481. In connection with this exhibit, Witness Mead said (R. 1446) in effect that a railroad can, through interchange of cars (or transfer of the lading) reach all railroad points in the country. Shipper witnesses as to rail competition include Hester, R. 789, 799; Faivre, R. 830; Evans, R. 880; Vayo, R. 888; Tupper, R. 893; Kirtley, R. 926.

[37] Witness Mead, R. 1139, 1144, 1146, 1160; Reicher, R. 1048; Altwater, R. 857; Howell, R. 967–968, 970, 974; Tupper, R. 897, 899; Korinek, R. 884; Vayo, R. 888; Lawson, R. 643; Arbour, R. 707–708.

squarely within the familiar rule that "Such aids are only admissible to solve doubt and not to create it." *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 589.

2. The measure of what constitutes adequate transportation service for the public is not to be gathered from the Antitrust Acts but from the criterion of the "public interest" supplied by the Interstate Commerce Act, which "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities"

The appellants rely greatly on subparagraph (e) of paragraph (2) of section 5 which provides that the Commission, in passing upon a consolidation, or merger, shall give weight to the consideration, *inter alia*, of the effect thereof "upon adequate transportation service to the public." Predicated upon this provision, the appellants contend that the Commission is authorized to approve consolidations that substantially lessen competition only as necessary to maintain adequate transportation service for the public and only if it finds that *existing* service is inadequate (Br. 38–46).[35] Other than that they consider that the Commission's different conception of the provision is in conflict with the antitrust laws (of which no mention is made in the provision), the reasons urged by the appellants in support of their contention seem to center and depend on a restricted meaning which they attribute to the

[35] McLean Brief, p. 6; Farm Bureau Brief, pp. 9, 11–14.

words "adequate transportation service" contained in the subparagraph in question.

In the Commission proceeding it was shown and found that the consolidation would, in addition to enabling economies and greater efficiency, enable, or facilitate, a through-trailer service which would make available to shippers a transportation service, shortened as to time in transit by many hours, and that it would enable greatly improved terminal service in cities and towns and safer road service. These findings, however, of direct benefits to the public expected to result from the consolidation, the appellants characterize as findings of "anticipated" or "promised" improvements in service[39] (Br. 37; McLean Br. 6) and they assert that, in any event, such findings did not establish what they insist was a prerequisite to approval of the consolidation, namely, that the existing service available to the public was "clearly inadequate" (Br. 38), and shown to be such by existing facts. In this way the appellants state (Br. 38–39) the Commission's judgments—

> are safeguarded in that the Commission is dealing with present existing facts which

[39] Whatever may be the rule under the antitrust laws in the respect of confining consideration to existing conditions, the Commission's functions under the I. C. Act are largely legislative in nature and, therefore, in any situation calling for it, the Commission is expected to apply its judgment as to future results and must do so in order to arrive at sound conclusions as to the public interest. Cf. *Ecker* v. *Western Pacific Ry Co.* (Railroad reorganization), 318 U. S. 448.

> can be examined. Evidence can be taken as to who is suffering from lack of adequate service and why. Economies in operation may be approved, but not at a price which involves undue restraint of competition. Remedies which involve some restraint of competition can be limited to curing the specific evils found. In short, public policy looks to private initiative in a competitive system to bring about future betterments of service.

The above, it is plain, can only mean that it is the appellants' view that the adequate transportation which the statute seeks to maintain for the public is a transportation service of qualified adequacy; for, if it is contemplated by the statute that the public is to be denied future betterments and improvements in service unless the existing service available to it is so "clearly inadequate" as described by the appellants, it could not be the statute's purpose to maintain for the public an adequate transportation service measuring up to usual standards of adequacy. However, the appellants' apparent view, that the Congress in speaking of adequate service for the public, had in mind such qualified adequacy is disputed in many ways.

Following the important additions and amendments made to the Interstate Commerce Act by Transportation Act, 1920, there was great need for construction of the new provisions and recon-

ciliation of the provisions of the Act as a whole and, in the relatively few decisions of this Court by which this was done, it was early seen and determined that the 1920 Act made a definite departure from the earlier legislation; that the Act as theretofore framed was primarily designed to prevent unjust discrimination by the carriers and the charging of excessive rates, whereas—

> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 585.

In subsequent decisions of the Court, of the lower courts, and of the Commission, this affirmative duty placed on the Commission was consistently referred to as the policy (or purpose) of the Transportation Act, 1920, to ensure an adequate transportation service for the public; as such it became widely known, and the "adequate transportation service" therein incorporated is undoubtedly the same as that referred to in the provision of section 5 (2) (c),[40] directing the

[40] Subparagraph (c) was added along with other amendments to section 5 made in 1940; that is to say, it was added at a time when the phrase "adequate transportation service for the public" had a definite and settled meaning through the decisions of the Court and the Commission. The Motor Carrier Act, 1935 (Part II, Int. Com. Act) as first enacted, covered unifications and consolidations of motor carriers by

Commission when passing upon any proposed transaction under paragraph (2), to—

> give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; * * *.

That the adequate service which it was the policy or aim of the Act to ensure for the public was not, as contended by the appellants, so limited in kind as to exclude betterments in service, simply as such, is shown by the decisions of this Court from the beginning [41] and including decisions in-

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separate provisions in section 213 thereof (49 Stat. 555–557) which provisions, including its provision for relief from the antitrust laws (Sec. 213 (f)) followed closely section 5 of the I. C. Act, as amended by Emergency Transportation Act, 1933, except the provisions then contained in section 5 for a plan of consolidation of the railroads (48 Stat. 217–219). The latter provisions were repealed by the Transportation Act, 1940, and section 5 was otherwise changed, the changes being particularly designed to bring the unification and consolidation of motor carriers and water carriers under the one section with the railroads (54 Stat. 905–908).

[41] The decisions in the *Wisconsin R. R. Case*, *supra*, in *The New England Divisions Case*, 261 U. S. 184, 189, and in *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, all speak of the purpose of Transportation Act, 1920, to ensure an adequate transportation service for the public. These decisions were, of course, rendered at a time when the restoration of the transportation service of the country was necessary, but it is apparent, even from a casual reading of the opinions, that it was not considered that the purpose of the 1920 Act was directed solely to a restoration of the carrier's properties and service or that the purpose would come to an end when the Commission might conceivably determine and find that the transportation service of the country or of any particular section, met the needs of the public. For example, in the

volving orders of the Commission authorizing unifications of carriers under section 5, wherein the said policy of Transportation Act, 1920, was referred to and applied. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Texas* v. *United States,* 292 U. S. 522.

In the latter case the Court sustained as valid an order of the Commission under section 5 authorizing the Kansas City Southern Railway to lease the railroad properties of the Texarkana and Fort Smith Railway. The validity of the order was challenged by the State of Texas in the respect only of a provision of the lease which, as approved by the Commission, would permit, contrary to the laws of Texas, the removal from the State of the general offices, repair shops, etc., of the lessor company for purpose of consolidating the same with like offices and facilities of the lessee, all to the end of efficiency and economy of operation. Answer-

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Dayton-Goose Creek Case, supra (p. 478), it is said that "The New Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." Similarly as respects adequacy of service, what constitutes prompt handling of traffic would seem necessarily to depend on new inventions and other progress in developing speedier transportation and quicker deliveries at terminals. The decisions in *R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331, 341, and in *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277, also turned on the policy of the 1920 Act to ensure adequate transportation service for the public. These decisions have particular reference to that part of the policy (involved here along with the whole policy) directed to economies and prevention of waste.

ing contentions of the appellant that the Commission's approval of the lease provision was beyond its statutory authority and, referring to changes made in the Act by recent amendatory legislation, the Court said (pp. 530–531): "These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward" the legislative policy of Transportation Act, 1920, "seeking to insure an adequate transportation service"; that "a primary aim of that policy was to secure the avoidance of waste" which "avoidance, as well as the maintenance of service, is viewed as a direct concern of the public"; and that—

> The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisitions of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appro-

priate provision and best use of transportation facilities." *New York Central Securities Corp. v. United States, supra.*

The above case and the *New York Central Case, supra,* definitely supply, therefore, decisions of this court making direct application of the Act's purpose to ensure an adequate transportation service for the public to its provisions empowering the Commission to authorize such consolidations of carriers as it finds to be in the public interest and which, in doing so, hold substantially that the said criterion of a consolidation in the interest of the public has direct relation to the "adequacy of transportation service (which it is the Act's purpose to ensure for the public); to its essential conditions of economy and efficiency, and to appropriate provision and best use of transortation facilities." The fact that the conditions of propriate provision and best use of transportation facilities are essentials to such adequate transportation service, seems definitely to establish that the word "adequate" was not used to indicate a purpose to ensure for the public a transportation service of qualified adequacy; that is to say, that the word was not used to indicate a purpose, as in effect contended by the appellants, to withhold from the public the improvements in service, efficiency, etc., that would result from a consolidation unless it was also shown and found that the existing service available to it was inade-

quate."* The appellants' contention that it does is, it is true, limited to consolidations which would substantially lessen competition (Br. 40–41), but this simply emphasizes the lengths to which the appellants would have the Commission "go" in reading into Section 5 of the Interstate Commerce Act "The provisions and policies of the antitrust laws" (R. 92).

The appellants, in making their said contention that the Commission must, before approving a consolidation that substantially lessens competition or otherwise conflicts with the antitrust laws, first find that the existing service available to the public is inadequate, predicate the contention, as above said, on the provision of Section 5 directing the Commission to give weight to the effect of the consolidation on "adequate transportation service to the public." But this not alone assumes, contrary to the fact, that it was the Act's purpose, or aim, to ensure to the public a transportation service of qualified adequacy, but also loses sight of the fact that the statutory standard (or ultimate criterion) of a permissible consolidation is one that is in the interest of the public. Keeping this statutory standard in mind, it is manifest that any findings contemplated because of the direction to give weight to the effect of the consolidation on ade-

* Inadequate in the sense emphasized by appellants of being "clearly inadequate" and shown to be so by "present existing facts" (Br. 38).

quate service to the public (including its essential conditions of economy, efficiency, etc.) would either be affirmative findings (such as here made by the Commission)[43] that the consolidation would result in improvements in service, economies or greater efficiency, or, if the evidence were to the contrary, findings which would give effect to that evidence and support the Commission's refusal to authorize the consolidations.[44] From which it seems necessarily to follow that the fundamental error in the appellants' contention that the Commission may not authorize consolidations that substantially lessen competition without first finding (Br. 42–44) that the existing service available to the public is "inadequate" is that the contention would, in effect, take the statutory direction that the Commission give weight to the consideration of adequate transportation service and make it, with antitrust restrictions and prohibitions at-

[43] As exemplifying this see discussion and accompanying underlying findings in the chapter of the report headed "Benefits of Proposed Unification."

[44] Even if the Commission, in balancing the evidence of improved service against the resulting diminution in competition, considered that the latter outweighed the former, the findings which it would make to support its conclusion that the proposed consolidation was not in the public interest would reflect the considerations inducing its conclusion and denial of the application, and would not, of course, be findings to the effect that since the lessening of competition that would result would be substantial and since the existing service available to the public was adequate, authority for the consolidation must be denied.

tached, the standard, or criterion, in consolidation cases instead of the prescribed standard of the public interest.

The appellants' contentions (Br. 44–46) that the Commission did not make the findings required by section 5 are without warrant. As shown in the present and preceding chapters, the Commission's report under the headings "Benefits of Proposed Unification" (R. 15), "Effect on Employees" (R. 18), "Competition" (R. 22) and "General" (R. 43), contains all the findings required or contemplated, to support its conclusion that the consolidation would be consistent with the public interest, including the findings contemplated by Section 5 (2) (c).

3. The Commission's authorizations of motor carrier consolidations, as well as its authorizations of railroad, water carrier, and other carrier consolidations, are provided for in section 5 of the Act and are governed, not by a special criterion, but by the same criterion of the "public interest," supplied by the Act to govern all such authorizations

It will have been noted that the appellants, both in their assignments of error and in their briefs allege that the Commission erred in basing its findings on "the standards and criteria prescribed by the Transportation Act of 1920 with respect to the merger of rail carriers instead of the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers" (R. 82, Br. 15). Upon a first reading thereof, at least, this allegation appears to be to

the effect that, while authorizations of rail and other Part I carrier mergers (or consolidations) continue to be governed by the standards and criteria inaugurated by Transportation Act, 1920, the authorizations of motor carrier mergers are governed by different and special standards and criteria prescribed by Transportation Act, 1940. On the other hand, the appellants, in argument under the allegation, urge that the different standards and criteria, which they allege were prescribed by the 1940 Act "with respect to the merger of motor carriers," were also adopted with respect to the merger of railroads and other carriers subject to the Act (Br. 18). But, since still other of their argument stresses the different and special [45] policy and purposes which the appellants assume that Congress had in mind with respect to motor carrier mergers, it seems appropriate at least to refer briefly to the facts which make manifest that mergers of motor carriers were not singled out for the prescription of standards and

[45] In this connection it should be noted particularly that the appellants are apparently under the impression that the provisions of section 213 of the original Motor Carrier Act, 1935, (covering the unification and consolidation of motor carriers) were designed specially and particularly for motor carriers (Br. 18) whereas, except in the matter of a plan of consolidation, they followed closely, as hereinafter shown, the provisions of section 5, as amended by Emergency Transportation Act, 1933. For other statements showing that the appellants apparently consider that motor carriers were singled out for special treatment, see Brief 29-33.

criteria different from those which were to govern the mergers generally of carriers subject to the Act and particularly that they were not singled out to be governed by standards and criteria of what would constitute permissible mergers, or consolidations, under the antitrust laws.

As already mentioned, Part II of the Interstate Commerce Act (dealing with motor carriers) as first enacted in 1935,[*] covered the subject matter of unifications and consolidations by separate provisions in section 213 (49 Stat. 555–557) which followed closely section 5 of Part I, as amended by Emergency Transportation Act, 1933 (48 Stat. 217, 218; *Texas* v. *United States, supra*), except the provisions then in section 5, but eliminated by Transportation Act, 1940, for, and in respect of, a plan of consolidation of the railroads, and except for a proviso contained in section 213 (a) (1), reading as follows:

> *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote

[*] The railroad and motor carrier parts of the Act were not actually termed Part I and Part II, respectively, until the 1940 amendments which also added Part III, dealing with water carriers.

> the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

As for the provision in section 5 of Part I for relief from the antitrust laws, section 213 of Part II contained a substantially identical provision, reading as follows:

> (f) The carriers and any person [47] affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints, and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

Along with the elimination by Transportation Act, 1940," [48] of the provisions of section 5 of Part

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[47] Instead of the words "any person" the "relief clause" in section 5 used the words "any corporation" (48 Stat. 219). The word "person," as defined in the Motor Carrier Act included "any individual, firm, copartnership, corporation * * *" (49 Stat. 544).

[48] With respect to the abandonment by the 1940 Act of the scheme of a consolidation of the railroads according to a plan of the Commission, the Committee report (to accompany S. 2009), speaking of this change, states at pages 2,

I for a plan of consolidation of the railroads that section was otherwise changed, the changes being particularly designed and worded so as to bring the subject matter of unification and consolidation of motor carriers and also water carriers under the one section with the railroads and other Part I carriers (54 Stat. 905–908). The clause, according relief from the antitrust laws, as now contained in section 5 (11) (set forth in Appendix), is, it will be seen, strengthened by adding the provision at the beginning that "the authority conferred by this section shall be exclusive and plenary" and the succeeding provisions designed to enable the carrier, or corporation, obtaining the authorization to avail themselves thereof "without invoking any approval under State authority." There had been doubt whether the "relief clause" covered prohibitions other than restraints of the same nature as the antitrust laws. It was settled that it did in *Texas v. U. S.*, 292 U. S. 522, 534, but questions of corporate capacity of companies incorporated under State law, such as raised in the *New York Cen-*

28, and 30, that it was recommended in the report of the President's Committee of Six (pp. 30–32) and had also been recommended by the Commission (Report No. 433, pp. 2, 28, 30, 76th Cong., 1st Sess.). The principal reason for the abandonment seems, generally speaking, to have been that it was unworkable, at least without conferring compulsory authority on the Commission (52d Annual Report of I. C. C., pp. 14, 15. See also House Document No. 583, 75th Cong., 3d Sess., p. 39).

tral Case, 287 U. S. 12, were not wholly answered by the latter case or the *Texas case*. The last sentence of par. (11) provides, in effect, that, while the section is not to be taken to provide for a federal corporation, any power granted thereby to a carrier, or corporation, "shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." That part of the "relief clause" which has always been in section 5 is preserved in the middle of par. (11) except for changes adding "officers" and "persons" to the "carriers" and "companies" accorded relief, and adding relief from Municipal as well as Federal and State restraints, limitations and prohibitions of law. All change, it will be noted, is in the direction of strengthening the clause.

In addition to the above-mentioned changes made in section 5 by the 1940 amendments, the Commission was given express authority to condition its approval of railroad unifications and consolidations upon (1) fair and equitable arrangements to protect the interests of railroad employees, and (2) upon the inclusion in the consolidation of other railroads in the territory involved. In both cases, the authority so expressly conferred, had been theretofore exercised by the Commission in the view that it was authority covered by the policy and purposes of Transportation Act, 1920. *Lowden v. United States*,

308 U. S. 225; *New York Central Securities Corp. Case, supra.* Another change made in the section which clearly is also intended to confirm the Commission in authority and action of a kind previously exercised and taken is that embodied in subparagraph (c), the first portion whereof has just been discussed in the preceding chapter. This subparagraph provides in full that—

> (c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

As shown in the preceding chapter, the first of the above considerations to which the Commission is directed to give weight is in effect asserted by the appellants to have been intended to change and modify the criteria governing consolidations together with the clause according relief from the antitrust laws (Br. 42–43); and, in asserting their contentions in this respect, the appellants apparently urge them, too, as particularly applicable in respect o fmotor carrier consolidations

(Br. 40–41). But it seems wholly plain that the said direction to the Commission was for the exactly opposite purpose of emphasizing that the amended section 5 was to be taken as still embodying the policy of Transportation Act, 1920, to ensure an adequate transportation service for the public. Emergency Railroad Transportation Act, 1933, had, in enlarging the section, strengthened and carried forward that policy with respect to rail and other Part I carrier consolidations together with its criteria of adequacy of transportation service, efficiency and economy and best use of transportation facilities. *Texas* v. *United States, supra;* and it cannot be considered that Congress, when in 1940 bringing the matter of consolidations of motor carriers and water carriers into the same section as governed the consolidation of rail and other Part I carriers, either intended that different and special criteria should apply with respect to motor carrier consolidations, or that it had any intention other than that the policy and aims of Transportation Act, 1920, should be further carried forward and applied without exception to Part I, Part II, and Part III, carriers.

Moreover, the fact that Congress, in enacting the 1940 amendments, did not intend that motor carrier consolidations should be governed by special criteria but intended instead that the established criteria under the policy of Transportation

Act, 1920, should govern generally the consolidations of all carriers subject to the Act, is further affirmatively shown by the policy provisions of the Motor Carrier Act, 1935, which were carried into the 1940 Act. The policy provisions of the former Act (49 Stat. 543) declared it to be the policy, *inter alia*, to foster sound economic conditions in such transportation and to promote adequate, economical, and efficient transportation services; and these purposes are now embodied in the National Transportation Policy announced in Transportation Act, 1940 (54 Stat. 899), the first part of which reads as follows:

> It is hereby declared to be the national trasportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * *

While the appellants concede that the National Transportation Policy as well as section 5 (2) (c) of the Act makes it the Commission's duty "to insure adequate transportation service" (Br. 38), they refer at the same time to the earlier sentence providing for fair and impartial regulation of all modes of transportation, "so administered as

to recognize and preserve the inherent advantages of each," and state that these inherent advantages in motor carrier transportation "are to be achieved through competition and not regulated monoply." But, if the Act's policy to ensure adequate transportation service applies to the consolidation of motor carriers, then the conditions essential to such adequacy of transportation service" also apply, namely, the "essential conditions of economy and efficiency * * * and best use of transportation facilities." *Texas* v. *United States*, *supra*, p. 531. The same decision and many others show that such economy, efficiency, etc., are intended to be achieved in considerable measure through the elimination of competitive wastes. Moreover, it would not be "fair and impartial regulation" to administer section 5 so as to permit certain modes of transportation to achieve such economies and efficiency and to exclude such criteria from consideration in the administering of the section with respect to other modes of transportation.

4. The appellants' contention that the Commission is authorized to approve consolidations only after giving due consideration and weight to the provisions and policies of the antitrust laws is, in the application made of it, not substantially different from their contentions as to the specific things it must, or must not, do because of those laws

In further support of their allegation that the Commission, in approving the consolidation, misconceived its statutory authority, the appellants contend that it was required to give consideration

and weight to the provisions and policies of the antitrust laws, and that this it failed to do. As pointed out in chapter 3, supra, the appellants' contention, there discussed, that, with respect to consolidations involving a substantial lessening of competition or otherwise in conflict with the antitrust laws, the Commission may not authorize the same unless it first finds that the existing transportation service available to the public is "clearly inadequate" (Br. 38, 40) shows the lengths they would have the Commission go in giving weight to the policies and provisions of the antitrust laws. Similarly, the appellants' further insistence that the Commission is required to give weight to the provisions and policies of the antitrust laws (Br. 26–33) is pressed to such lengths and is so confused with argument which contemplates that those laws must be given full effect, or substantially so (Br. 28–31, 39), that it is apparent that the appellants, in contending that the Commission was required to give weight to the policies and provisions of the antitrust laws assumed that it was expected to accept the criteria of a permissible consolidation under the restrictive provisions of the antitrust laws and apply such criteria either as paramount to, or in practical substitution for, the criteria entering into and constituting the standard laid down by the Interstate Commerce Act.

The Commission, it is true, is charged with the administering of the Clayton Antitrust Act

"where applicable to common carriers subject to the Interstate Commerce Act, as amended" (Clayton Act, sec. 11, 48 Stat. 1102; 15 U. S. C., sec. 21) but, in the numerous cases since 1920 involving the authorization of unifications of carriers under section 5 of the Interstate Commerce Act, it has never been considered that the Commission was governed by what would be a permissible unification under the Clayton Act. This is true of the cases today and it is true, too, of the cases during the period (prior to 1933) when the Interstate Commerce Act did not itself forbid unifications without Commission authority and when, therefore, the only express restrictions were those of the Antitrust Acts and other "restraints or prohibitions by law, State or Federal."[49] But the

[49] Emergency Transportation Act, 1933, added to section 5 the express provision forbidding unification or consolidation without Commission authority (Sec. 5 (6), 48 Stat. 217, 218), which now appears in the Act as sec. 5 (4), 54 Stat. 907. (A like prohibition was placed in section 213 (b) (1) of the Motor Carrier Act, 1935 (49 Stat. 556) at the time when motor carriers were first made subject to the Commission's jurisdiction.) During the period prior to 1938 the Act itself did not prohibit unifications or consolidations, save as such might be implied (see I. C. Acts, Ann., p. 1355), and therefore, the only express restrictions then were, as above stated, the Antitrust Acts, etc. But there was no more reason then than now for looking to the Antitrust Acts to determine whether a unification was forbidden by the said Acts, except possibly to determine whether there was any occasion for obtaining the Commission's authorization. But that reason, it is plain, would not be to enable determination as to whether a proposed unification was one that was not forbidden by the Antitrust Acts, and therefore one which

Commission then as now was authorized to approve unifications if found to meet the standard of the public interest supplied by the Interstate Commerce Act, and not if found not to conflict with the Clayton and Sherman Acts and other prohibiting Acts, and then as now the carriers concerned were relieved from the operation of the said Antitrust and other Acts to the extent necessary to do the things permitted and required pursuant to such authorization and not to the extent only of doing the things that would not conflict with the said operation of the said Antitrust and other Acts.

It does not follow from the above, however, that the transportation criterion in section 5 of the Interstate Commerce Act itself does not include consideration of the effect of a proposed unification of carriers on competitive conditions in the transportation field; for such effect was given full consideration in the instant case and earlier, *Transport Co. Case*, 36 M. C. C. 61, 68, and has also figured importantly in railroad unifications. But this simply means that any detriment to the public interest from a lessening of competition is to be considered along with the benefits resulting from the unification and, since it is plain that the extent of the detriment to the

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the Commission could authorize, but would be to determine whether there was enough likelihood that the unification would be violative of said Acts to warrant resort to the Commission.

public interest in transportation from any lessening of the carriers "competitive striving" for business is the extent to which the same might affect the charges exacted from, and service rendered to, the public under the conditions of close regulation thereof laid down by the Interstate Commerce Act, it is made particularly clear that the weighing of such lessening of competition that might result from a proposed consolidation of carriers against the showing of benefits also resulting enters naturally into the criterion of the public interest based upon which the latter Act affirmatively permits of, and provides for, such a consolidation; and this being so, there is left no warrant for a strained and unnatural resort to a weighing thereof under the restrictive provisions of the Antitrust Acts and other prohibiting Acts.

The appellants' frequent use of the phrase "substantial lessening of competition" indicates that the Clayton Act is one of the antitrust laws to which they refer. The other is, of course, the Sherman Act. Their brief refers to it by name and bases upon it that part of their argument intended to show that, with the enactment of the 1940 amendments to the Act, Congress restored the original section 5 policy with respect to competition which it is asserted was later embodied in the Sherman Act (Br. 18–19). Further pursuing this argument, the brief contends that sec-

tion 5 should be construed as requiring the Commission to be guided by, and to give effect to, the policy and provisions of that Act which procedure, it is said, might well be regarded as a more effective means of ensuring compliance therewith than the enforcement remedies available to the Department of Justice, since section 5 requires prior administrative approval before a consolidation can be effected (Br. 28–29). This argument leaves no "room" for escape from the conclusion that it is the appellants' position in practical effect that the Commission is required to administer and apply the prohibitions of the Sherman Act.

In the Commision proceeding, as above pointed out, and in the lower court (R. 85–86) the Sherman Act was referred to by the appellants as prohibiting "unreasonable" restraint of competition, and, as in effect suggested by the lower court, such reference to that Act as prohibiting unreasonable restraint of competition carries the import that only those restraints which may, in light of surrounding circumstances and conditions, be found to be unreasonable are the restraints in fact forbidden by those Acts. But, while this is doubtless correct with respect to the Sherman Act (*United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *Standard Oil Case*, 221 U. S. 1, *Tobacco Case*, 221 U. S. 106, 178), it is, of course, the fact that such "unreasonable restraint" is not an express statutory standard of unlawfulness prescribed for ad-

ministrative guidance,[50] but is a standard of unlawfulness found to have been laid down by that Act for judicial guidance.[51] And, moreover, it is, of course, further the fact that what would be unreasonable restraint of competition under the Sherman Act whose single purpose is directed to the preservation of competitive forces (19 Cong. Rec. 6041; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50) and which expresses that purpose in terms of prohibition carrying criminal penalties, cannot be regarded as affording a standard of the extent to which the free play of competition was intended to be preserved under an Act (the I. C. Act) which, in order to advance its own aims and purposes, expressly provides for the authorization

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[50] The Sherman Act is committed to the Courts. The Clayton Act's prohibition against the acquisition by one company of the capital stock of another has been held to forbid such acquisitions as will probably effect a substantial lessening of competition. *International Shoe Co.* v. *Federal Trade Comm.*, 280 U. S. 291. The prohibition contains a proviso which provides substantially that it shall not apply to companies acquiring such stock solely for investment and not using the same to bring about the substantial lessening of competition. 15 U. S. C., sec. 18. See *Int. Com. Comm.* v. *Pennsylvania R. R.*, 169 I. C. C. 618. Order held invalid in *Pa. R. R.* v. *Int. Com. Comm.*, 66 Fed. (2d) 37. Affirmed by an equally divided Court, 281 U. S. 651.

[51] That the standard of "reasonableness" may vary with the Acts in which it is used is demonstrated by the fact that what constituted "rate reasonableness" under the I. C. Act prior to the amendments made by the Act of 1920 was changed by the very aims and purposes of the latter Act here under consideration. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R.*, *supra*, p. 585.

of the consolidation of independent carrier companies into a single company and expressly relieves the companies concerned from the operation of the said Sherman Act and other Acts so far as necessary to avail themselves of the authorization. *Texas* v. *United States*, 292 U. S. 522, 534.

While it is true, as above stated, that the appellants' contention that the Commission is authorized to approve only such consolidation as do not involve "unreasonable" restraint of competition within the sense of the antitrust laws is different in terms at least from their contention that the Commission, in passing upon a proposed consolidation, is required to give weight to the provisions and policies of the antitrust laws, it should be again emphasized (1) that, judged by the applications which the appellants make of the latter contention, it is not at all clear that the contention is more than marginally different from the other and (2) that, in any event, it is quite as squarely in conflict with the plain language of section 5. As support for the contention, the appellants rely upon this Court's decision in *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, which involved an order of the Labor Board requiring the Steamship Company, among other things, to reinstate certain members of the crew of one of its boats who had been discharged for engaging in a strike under conditions which the Court held amounted to

mutiny in violation of sections 292 and 293 of the Criminal Code. The Board contended that the strike did not violate the sections in question but urged that, even if it did, its order was nevertheless valid by reason of the fact that section 10 (c) of the National Labor Relations Act permitted it to require an employer who has committed an unfair labor practice to take such affirmative action, including reinstatement of employees, as will effectuate the policies of the Act. As to this the Court said (p. 46) that the authorization had considerable breadth, but that it was also true that the discretion had its limits, and that it had already begun to define them. Continuing, the Court said (p. 47):

> * * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

That the above decision and statement are not apposite here is apparent from the facts, among others, (1) that, while the Labor Board's author-

ity in the respect of unfair practices under the Labor Act's policies had not as yet been defined, the Commission's authority under the policy of Transportation Act, 1920, including its authority under section 5, has been the subject of a long line of decisions of the Court, and (2) that, while the Labor Act makes no mention of the said sections 292 and 293 of the Criminal Code, section 5 of the Interstate Commerce Act does make mention of the antitrust laws in its provision which expressly relieves from the operation of those laws the carriers participating in a consolidation authorized by the Commission. In the latter situation, it is clear that Congress itself did not expect that the policy and provisions of the Interstate Commerce Act be accommodated to those of the antitrust laws; and it is a situation, therefore, that is plainly not included in the Court's statement, above quoted, that frequently the Congressional purpose calls for careful accommodation of one statutory scheme to that of another. The Interstate Commerce Act, being a statute which places the carriers under close regulation as to their charges and in many other respects, Congress' departure in the matter of consolidations from the policies, or statutory scheme, of the antitrust laws furnishes no ground, even remotely, either for surprise or for the thought that such action was in any way inconsistent.

5. The construction which appellants ask be placed upon the statute is in square conflict with its language and with the decisions applying it from time of enactment

The Congress with full realization, it must be assumed, that the legislation was not in line with the prohibitions of the antitrust laws, nevertheless, provided in section 5 for authorization of consolidations of common carriers subject to Interstate Commerce Act regulation and, at the same time removed the obstacle presented by said prohibitions by adding a provision expressly granting relief therefrom. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25, 26. If the provision for such relief had not been included in the legislation, it still would seem that it would have had to be implied from the power and duty placed with the Commission; and, with the provision expressly included, there is little "room" for the appellants' insistence that the statute be read as precluding consolidations prohibited by the antitrust laws or by the policies and provisions thereof.

In the *New York Central Case*, *supra*, which involved the validity of an authorization for unification by 99-year lease of railroads embraced in the New York Central System, the Court, answering contentions to the contrary, held that the standard of the "public interest," when read in its context in the Act, amply supplied the transportation criteria to be followed by the Commission. The Court said (p. 25):

> The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest," as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself.

Continuing, the Court said (pp. 25, 26) that "the fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission"; for, "the Congress which had power to impose prohibitions in the regulation of interstate commerce, *Northern Securities Co. v. United States*, 193 U. S. 197, had equal power to foster that commerce by removing prohibitions and by permitting acquisitions of control where that was found to be an aid" to purposes of Transportation Act, 1920, and that—

> * * * Exercising this paramount power, the Congress expressly provided in subdivision (8) of section 5, which has direct reference to subdivision (2) that "the carriers affected by any order made under the foregoing provisions of this section" are "relieved from the operation of the 'antitrust laws'," and "of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to

> enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case.[32]

The above is about as clear a statement as could be made that the authorizations of unifications, or acquisitions of control, which relieve from the Antitrust Acts, etc., are to be based upon transportation criteria supplied by the Interstate Commerce Act and certainly refutes any suggestion that they are to be based on criteria of what is, or is not, forbidden by the said Antitrust Acts and other prohibiting Acts. The Court, it will be seen, accepts, at least for purposes of the case, the fact alleged by the appel-

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[32] As given to it by Transportation Act, 1920, the Commission's authority to approve unifications was contained in section 5 (2), and its authority to approve consolidations in section 5 (6) (41 Stat. 481, 482). In authorizing a consolidation, it had to find that it conformed to its plan of consolidation of the railroads (sec. 5 (4), which had not been completed at the time of the *New York Central Case*, which presumably was the reason its authority was invoked to approve unification by lease which it could do so long as not amounting to consolidation. The Court held that the acquisition of control by lease did not amount to a consolidation within the meaning of the Act (p. 23).

lant (p. 22)[*] that the lines were parallel and competing; and the Court's further statement with respect to the fostering of commerce by the removal of prohibitions and the permitting of unifications has direct reference, of course, to the antitrust laws and to unifications prohibited thereby, and, therefore, is not only a holding as to the removal of the antitrust prohibitions, but also gives recognition to the fact that the purposes of said prohibitions were not the same but, on the contrary, were an obstacle to the accomplishing of the purposes of the Interstate Commerce Act in permitting of unifications. From all of which it is plain that neither the criterion of the policies and provisions of the Antitrust Acts, or the criterion of whether a consolidation would involve the *unreasonable* restraint of competition forbidden by those Acts, is not the criterion prescribed for Commission guidance. The criterion prescribed is the "public interest," and, as emphasized by the Court (p. 25) the considerations entering into that criterion are the Act's said purposes to promote adequacy, economy and efficiency of service and best use of transportation facilities, etc., "questions to

[*] The appellant alleged that the lessor and lessee main lines were parallel and competing so that competition would be suppressed in violation of the antitrust laws, and that the attempt to authorize the Commission to approve the unification was an unconstitutional delegation of power.

which the Commission had constantly addressed itself in the exercise of authority conferred."

The decisions under section 5 other than that in the *New York Central case*, *supra*, show quite as plainly as is shown in that case that the criteria governing the Commission's determinations are those furnished by the above-stated purposes of the Interstate Commerce Act itself and, by the same token, show that the Commission is not expected to resort to the purposes of the antitrust prohibitions for guidance. In the case of *Texas v. United States*, *supra*, the Court said that "The criterion to be applied by the Commission" was "that of the controlling public interest" and it then quoted from the *New York Central case* to show that the term "public interest" afforded a definite guide for Commission determinations (292 U. S. 531). In *Missouri Pacific Ry. v. United States et al.*, 4 Fed. Supp. 449, the attack on the Commission's authorization was principally based on the Commission's refusal to consider rights of the Texas & Pacific and the alleged interest of the public in the so-called Gould-Huntington agreement. The Commission had held substantially that the "public interest" criterion did not require, or permit, it to attempt to construe and apply the agreement, and in this it was sustained by the lower court (p. 454), whose decision was affirmed per curiam in 293 U. S. 524.

In *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, the Commission approved a unification as in the public interest which was established in law and fact to constitute an *unreasonable* restraint prohibited by the Sherman Act. The unification had been entered into prior to the enactment of the section 5 provisions with respect to unifications and relief from the antitrust laws and had been held (*United States* v. *So. Pac. R. Co.*, 259 U. S. 214) to be violative of the Sherman Antitrust Act. The Commission, in that case, held in substance that the fact that a unification was violative of the Sherman Antitrust Act did not deprive it of jurisdiction; that full effect had to be given the provision for relief from the antitrust laws and other restraints and prohibitions of law and that when it, upon broad considerations of the public interest, in effect granted such relief, it was exercising a power granted to it alone (p. 516).

The Commission was upheld in the above in *United States* v. *Southern Pacific Co.*, 290 Fed. 443, the Court holding, among other things, that (p. 450)—

> By virtue of the Commission's aforesaid order of authorization said ownership of said stock under conditions imposed by the Commission is now lawful, and in respect thereof the Southern Pacific Company and the Central Pacific Railway Company are relieved from the operation of the Sherman

> Law (as well as of all other restraints or prohibitions of law, state or federal) in so far as necessary to enable them to do anything authorized or required by the said order of approval and authorization of the Commission.

Accordingly, it will be seen that despite the fact that the unification involved in this case had been settled and established as working an *unreasonable* restraint prohibited by the Sherman Act, the District Court, nevertheless, had no difficulty in finding that the unification "is now lawful" and the carriers "relieved from the operation of the Sherman Law." True, the United States did not take this case to the Supreme Court, but it would seem that that Court's decision in the first case to reach it involving the question, namely, the *New York Central case, supra,* was in all essential respects the equivalent of an affirmance of the lower court's decision in the *Southern Pacific case.*

The Commission's views, as expressed in the present motor carrier case, are the same as the views it has held from the begininng. When, as above in effect stated, Congress made motor carriers subject to regulations generally and gave its express authority for their unification or consolidations, accompanied by its same express provision for relief from the antitrust laws and other restraints, it is manifest that it had no thought of relaxing its aims and purposes of promoting

economy and efficiency of service and best use of facilities under the Interstate Commerce Act in favor of a "brand" compatible with the prohibitions of the antitrust laws. And, moreover, the instant motor carrier case similarly as the Southern Pacific and New York Central cases, sharply illustrates that the very circumstances rendering a unification in the public interest may also be the circumstances rendering its violative of the Antitrust Acts.

The *Southern Pacific case*, *supra*, affords opportunity to contrast from a factual standpoint a unification which, on the one hand, constituted an unreasonable restraint prohibited by the Sherman Antitrust Acts and, on the other, was plainly in the public interest under the Interstate Commerce Act. There the Commission, speaking of the manner in which the Court required separation of the Central Pacific from the Southern Pacific, said (76 I. C. C. 508, 520) that it entertained no doubt that such arrangements were practicable and would eliminate or mitigate many of the disadvantages of separation to which it had referred, but that, on the whole, it was—

> convinced that even if everything of this nature *which can be done were done*, the result would be more expensive and less efficient and satisfactory service than can be rendered under unified control. The two systems would be weakened both financially and from a standpoint of service. In the

course of time this situation might find partial remedy, but in many respects *no remedy would be possible*. [Emphasis supplied.]

The above and earlier statements of the Commission that the separation of the roads would result in duplication of investment, increased cost of transportation and doubt as to whether the Central Pacific would, for a time at least, have the earning capacity and financial ability to sustain its burdens of fixed charges and provide for the new equipment and improvements necessary to meet the requirements of the public, reminds of the showing in the instant case that the unifying of the carriers involved and resultant combining of their facilities and revenues would enable a fuller use of much needed equipment and terminals and many improvements in service. In the former case the fact that like benefits and advantages would be lost did not save the unification from constituting an *unreasonable* restraint condemned by the Sherman Act, and, similarly here the fact that said benefits would be gained does not, according to the appellants' contentions, save the unification authorized from the prohibitions of that Act and other Antitrust Acts.

Another illustration of the fact that the policy and provisions of the antitrust prohibitions are not in harmony with the criterion of the "public interest" under the Interstate Commerce Act is

afforded by the *New York Central case, supra;* for, it is apparent that in that case the very unifying of the parallel lines and services involved, which, on the one hand, was alleged to suppress competition in violation of the Antitrust Acts,[9] was the source, on the other, of much of the economies and betterments of service advanced to support the unification as in the public interest. 287 U. S. 12, 23, 25. See also 150 I. C. C. 291, 292. The same circumstance is present with respect to the duplicating routes and facilities in the instant motor carrier case, that is, the unifying of operation which will effect economies and betterments in service is also the very thing which will eliminate competition between the carriers. The appellants' objection, too, to the instant consolidation because it will result in instances of operations where Associated Transport will be the sole motor carrier conducting such operations seems further illustrative of the conflict between the Antitrust Acts and the regulatory objectives of the Interstate Commerce Act; for, whatever may be the prohibitions of the Antitrust Acts

[9] The fact that, since the New York Central already had stock control, competition may have been already largely eliminated, does not affect the illustration. The Central showed that it could bring about economies and improve service by routing traffic over the lines of the constituent carriers constituting the most direct routes and asserted that it could not do this, at least to the same extent, so long as it had only stock control because it had to observe the rights of minority interests (150 I. C. C. 291, 292).

in this respect, an application for consolidation under the Interstate Commerce Act could not be properly denied because the applicant would, as to certain of the operations, be the sole operator and thus have a "monopoly" of such service. If such restrictions against the granting of applications were to be read into section 5, there would be many situations where, as in effect stated by the Commission, the public would have to be denied the benefit of a new service, or even an extension of service into new territory, for the reason simply that, being new, the carrier given the authority would be the sole operator and have, for a time at least, a monopoly in the rendering of the services.

The decision in *Texas* v. *United States*, *supra* (292 U. S. 522, 530, 531), shows that the purposes of Transportation Act, 1920, to promote an adequate and efficient transportation service for the public, avoidance of waste and best use of transportation facilities, was confirmed and carried forward by the broadening provisions of Emergency Transportation Act, 1933. The more recent decisions in *Lowden* v. *United States*, 308 U. S. 225, 230, and *Int. Com. Comm.* v. *Railway Labor Assn.*, 315 U. S. 373, 376, 377 (the latter rendered subsequent to Transportation Act, 1940), show that no change has since been made in those purposes. As for the clause in section 5 according relief from the antitrust laws and other re-

straints and prohibitions in law, Federal, State, or Municipal, it is, as above stated, shown by its own terms to have been broadened and strengthened by the 1940 amendments. (See Appendix.)

6. The Commission's approval of the consolidation, being fully supported by its findings and the evidence, stands as a valid authorization, bringing into play the clause of the statute expressly relieving the participating carriers from the antitrust laws

Since, as above stated, the benefit to the public from competition between carriers for traffic lies in its effect as an incentive to improved service and lower rates, any lessening of competition resulting from a consolidation of carriers proposed under section 5 of the Interstate Commerce Act is a matter of public concern and, therefore, properly to be considered, along with the benefits also resulting, in determining whether the consolidation proposed meets the criterion, or standard, set up by that section of a consolidation that is consistent with the public interest. And while, since, as also above stated, the extent of any detriment to the public from such lessening of competition is plainly affected by the fact that the rates and service of the participating carriers and of substantially all their competitors are subject to close regulation under the Interstate Commerce Act, this fact by no means eliminates from consideration the lessening of competition resulting from the proposed consolidation of carriers, although it does make all the more apparent that the weighing thereof against the showing of

resulting benefits enters naturally into, and is specially reflected by, the particular criterion, based upon which the said regulatory Act provides for the authorization of such a consolidation.

In pursuance, therefore, of the need for giving consideration to the effect of the proposed consolidation on competitive conditions in the field in which Associated Transport would operate, the Commission, as above shown, addressed itself to that question and, upon substantial, and in fact abundant, evidence, found that the motor carrier competition that would remain after the consolidation of the eight carriers into Associated Transport was ample throughout the territory involved; and it also made findings as to the competition other than by motor carriers that would be afforded, as for example, that afforded by rail carriers, by express companies, by water and contract carriers, by carloading and forwarding companies and other agencies of transportation (Supra, p. 56). As for the appellants' contention that Associated Transport would be of a size enabling it to suppress the competition of independent motor carriers, this is answered fully by the Commission's discussion and findings, reviewed above, including its findings that there was no indication that anything approaching a monopoly had resulted from the operations of other large systems which it referred to, and, in

effect, that there was no reason to believe that Associated Transport would be even able to secure more than its proportionate share of the available traffic.

Accordingly, the Commission's findings that the numerous independent carriers that would remain after the consolidation would afford ample competitive service throughout the territory involved and its findings showing that there was no reason to believe that Associated Transport would be able to suppress the competition of independent carriers, or secure a disproportionate share of the traffic, lead rationally to its conclusion with respect to the effect of the consolidation on the competitive situation, namely, its conclusion "that the proposed transactions would not result in undue restraint of competition" (R. 37). With this element thus disposed of and showing that there would be little, if any, loss to the shipping public of the benefits from competitive effort, the many direct benefits which it was shown might be reasonably expected could, it would seem, be "put down" as practically net gain. Since these benefits have been already discussed in the preliminary statement of this brief, it is sufficient here to mention a few outstanding ones, such as that the unification of the carriers into one unit would, for example, enable the inauguration of through-trailer service, cutting down the time in transit of traffic now interchanged and reducing

terminal costs and loss and damage claims; would enable the consolidation and more convenient use of the terminals now separately maintained in cities and towns and the establishment of terminals in additional towns; would enable the more efficient and greater utilization of equipment now separately owned, this being particularly important because of the present difficulty in securing adequate equipment to meet the needs of the public; and would enable the extension throughout the system, as planned, of a scientific maintenance and safety program which would add to the average life of equipment and result in safer operations and fewer road failures (R. 15–16). Along with the improvements in service so enabled, it was shown that, through the elimination of duplicating facilities and service and greater efficiency, there would result very large savings and economies, and that further economies could be effected through the greater purchasing power of Associated Transport and its ability to obtain financing at lower cost (R. 17–18).

Another thing outstanding in the case was that the method of promoting the consolidation directly through the stockholders of the companies involved enabled a conservation of assets not otherwise possible, or at least not generally achieved through other methods. This, the Commission emphasized by reference to the earlier *Transport Co. case*, stating that, while in that case substantially

all the consideration for the properties was to be paid in cash to be obtained from the public, and large promotional and organizational fees were to be paid, in the instant case the stockholders of the constituent carriers were to receive no cash and no fees were to be paid to promoters or organizers (R. 44–45).

In short, the proposed consolidation gave a decided promise of marked betterments of service, of greatly reduced costs in the rendering thereof and of a carrier resulting whose assets would not be depleted at its inception; and, since ample competitive service would remain and no undue restraint result, such consolidation would cause little, if any, loss to the public of the benefits from competitive effort. These results and circumstances being established by the Commission's findings on a record of evidence which was plainly ample, it is apparent that there was an entirely sound basis in fact and reason for its conclusion that the proposed consolidation would be consistent with the public interest (R. 45–46), and for its order (R. 56) authorizing the consolidation based on its said conclusion as to the public interest. And such authorization being made and entered, the carriers and persons concerned were (if the statute be followed) thereupon "relieved from the operation of the antitrust laws and of all other restrains", etc., insofar as necessary to the transactions authorized (Sec. 5 (11)).

III. The authorization of security issues

The complaint and the assignments of error in terms attack the Commission's order both as to its authorization of the consolidation and as to its authorization for issuance of securities necessary to consummate the consolidation. The attack on the latter appears to rest practically in whole on the asserted invalidity of the former, and insofar as this is the fact, has been shown to be groundless. To the extent that the appellants may be taken as making separate attack on the security authorization, it is submitted that the discussion in the preliminary statement (pages 16–25) shows that the Commission acted within its authority and made adequate and, in fact, full findings, and that the record references there given show that its findings are amply supported by the evidence.

CONCLUSION

For the above reasons it is respectfully submitted that the decree of the lower court should be affirmed.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1943.

APPENDIX

Statutes involved

Pertinent provisions of the Interstate Commerce Act important in the consideration of this case are:

> SEC. 5. (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or
>
> (ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in, or joint use of, any railroad line or lines owned or operated by any other such carrier and terminals incidental thereto.
>
> (b) Whenever a transaction is proposed under subparagraph (a), the carrier or

carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in the case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(e) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction in-

volving a carrier or carriers by railroad subject to the provision of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or

management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance

with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its power under its corporate charter or under the laws of any State.

SHERMAN ANTITRUST ACT, JULY 2, 1890 (26 STAT. 209)

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1943.

McLean Trucking Company, Inc., the Secretary of Agriculture of the United States, et al., Appellants,
vs.
The United States of America, Interstate Commerce Commission, et al.

Appeal from the District Court of the United States for the Southern District of New York.

[January 17, 1944.]

Mr. Justice Rutledge delivered the opinion of the Court.

This is an appeal from a decree of a statutory three judge court,[1] 48 F. Supp. 933, refusing to set aside certain orders of the Interstate Commerce Commission which had authorized consolidation of seven large motor carriers.

Associated Transport, Inc., was organized in Delaware in March, 1941, to bring about the proposed merger. In July, 1941, it applied to the Interstate Commerce Commission for permission, under Section 5 of the Interstate Commerce Act, as amended (49 U. S. C. § 5; 54 Stat. 898, 905), to obtain control of eight motor carriers, through purchase of their capital stock, and to consolidate their operating rights and properties into one unit within a year from the date it acquired stock control. At the same time, Associated applied for permission under Section 214 of the Motor Carrier Act of 1935 (49 U. S. C. § 314; 49 Stat. 543, 557, 52 Stat. 1240, 54 Stat. 924) to issue preferred and common stock to be used mainly in exchange for stocks of the eight common carriers and four associated noncarriers.

Before the Commission, approval of the applications was opposed by the Secretary of Agriculture, the Anti-Trust Division of the Department of Justice, the National Grange, four fruit growers associations and Super Service Motor Freight Company, a motor carrier.[2] An examiner held hearings at which evidence

[1] 28 U. S. C. §§ 44, 47, 47a, 345.

[2] Other motor carriers, shippers and shippers' organizations intervened in the proceeding, as did also the International Brotherhood of Team-

was introduced, and the Commission heard argument on objections to his report before finally authorizing the consolidation.[3] 38 M. C. C. 137. McLean Trucking Company, Inc., a motor carrier which claims to compete with some of the carriers included in the merger, brought suit in the District Court to set aside the Commission's orders. The Secretary of Agriculture and the American Farm Bureau Federation intervened as plaintiffs. The United States confessed error. The Interstate Commerce Commission and the parties to the merger defended the Commission's order.

The principal issues, later set forth with particularity, are intertwined. They relate to whether the Commission applied a proper standard in concluding to approve the merger; whether it failed to give due weight to the prohibitions and policies of the anti-trust laws; and whether, upon the evidence and within the meaning of Section 5(2)(b) of the Interstate Commerce Act, the Commission rightly could determine that Associated, upon consummation of the merger, would not be affiliated with any railroad. The Commission resolved all of these questions in favor of the merger, as did the District Court.

In one respect, however, the case as presented to the court was in different posture than as it came to the Commission. This change arose from the elimination of one of the constituent companies, Arrow Carrier Corporation, from the merger between the time the Commission's orders were rendered and the hearing in the District Court. After the suit was begun the Commission, on the applicant's petition, modified its orders to exclude Arrow. Accordingly the Commission also amended its answer to indicate the change, and the case was decided on the orders as modified. They present the only questions for our consideration. It may be noted that the elimination of Arrow has bearing upon the issue relating to anti-trust policy, but more particularly on that relating to railroad affiliation.

The eight carriers originally sought to be merged[4] were Arrow Carrier Corporation, Paterson, N. J.; Barnwell Brothers, Inc., Burlington, N. C.; Consolidated Motor Lines, Inc., Hartford,

sters, Chauffeurs, Warehousemen and Helpers of America. Except for the latter, which at first opposed but ultimately supported the application, they took no position on the question whether the application should be approved.

[3] Three commissioners dissented. Approval of the merger was qualified by the imposition of certain conditions not here relevant.

[4] The four noncarriers, each associated with one of the carriers, are Barnwell Warehouse & Brokerage Company (associated with Barnwell), Brown

Conn.; Horton Motor Lines, Inc., Charlotte, N. C.; McCarthy Freight System, Inc., Taunton, Mass.; M. Moran Transportation Lines, Inc., Buffalo, N. Y.; Southeastern Motor Lines, Inc., Bristol, Va.; and Transportation, Inc., Atlanta, Ga. The merger embraces some of the principal operators along the Atlantic seaboard from Massachusetts to Florida. Certain of them serve communities as far west as Cleveland, Ohio, Nashville, Tennessee, and New Orleans, Louisiana. But the most important effect will be to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service. According to evidence before the Commission the total assets of the companies involved, as of April 30, 1941, exceed $8,000,000 and their gross operating revenues for 1940 exceeded $19,000,000. The carriers operate principally as motor vehicle common carriers of general commodities over regular routes totalling 37,884 miles. Over 13,546 miles between important service points one or more competes with others in the group.[5] This competitive mileage will be eliminated by the merger, leaving a single carrier with routes extending over 24,338 miles.

As a result of the proposed merger Associated will be the largest single motor carrier in the United States—at least in terms of its estimated revenues—and no other single motor carrier will compete with it throughout its service area. Nevertheless, after careful consideration and on evidence clearly sufficient to sustain it, the Commission found that on completion of the merger "there would remain ample competitive motor-carrier service throughout the territory involved" and in addition that one or more rail carriers would offer substantial competition to Associated at all principal points. It also found that the consolidation would result in improved transportation service. Through movement of freight would be simplified and expedited, equipment would be utilized

Equipment & Manufacturing Company (associated with Horton), Conger Realty Company (associated with Horton), and Southern New England Terminals, Inc. (associated with McCarthy).

[5] The Commission found that Consolidated and McCarthy compete substantially throughout Connecticut, Massachusetts and Rhode Island but Consolidated alone operates between those areas and New York City. Consolidated and Moran compete between the principal points in New York State, but Moran's routes also extend to Cleveland, Ohio, and to several points in northern Pennsylvania. There is some competition among Arrow, Consolidated and Moran in New York, and others of Arrow's routes parallel those of Barnwell and Horton. Barnwell, Horton and Southeastern compete to some extent in parts of the Middle Atlantic States (excluding New York). Barnwell, Horton and Transportation, Inc., compete in portions of the southern region, and Southeastern competes somewhat with them in that area.

more efficiently, terminal facilities improved, handling of shipments reduced, relations with shippers and public regulatory bodies simplified, safe operation promoted, and substantial operating economies would be achieved. The Commission concluded that the applicant's assumption of the fixed charges of the carriers would not be inconsistent with the public interest, and consummation of the proposed transaction would not result in substantial injury to the carrier employees affected.

In connection with Arrow's participation, the Commission found that The Transport Company, whose stock was wholly owned by Kuhn, Loeb and Company, had an option to purchase Arrow's common stock and would receive Associated's stock therefor when the merger was effected. The stock thus received, together with 9,000 shares of Associated's common stock already held, would give The Transport Company, and through it Kuhn, Loeb and Company, 6,877 shares of Associated's preferred and 67,167 of Associated's common, a total of 13 per cent and 9.53 per cent, respectively, of the preferred and common stocks expected to be outstanding at the conclusion of the transactions.[6] Kuhn, Loeb and Company is represented on the boards of directors of several railroads and for years has had investment banking connections with the Baltimore and Ohio and the Pennsylvania Railroads, each operating in territory to be served by Associated. A representative of Kuhn, Loeb and Company would be one of Associated's nine directors. After examining the blocks of stock which other persons would hold on completion of the consolidation and other matters bearing on the relationship between the pro-

[6] Associated is authorized by its charter to issue 100,000 shares of $100 par value preferred stock drawing six per cent cumulative dividends annually and 1,000,000 shares of $1.00 par value common stock. One of the conditions of the Commission's order here is that no par value be assigned the common stock. The Commission found that in exchange for all the outstanding stock of the merged companies (except a small quantity of the preferred stock of two of the carriers which was to be redeemed for cash) Associated was to issue 648,643 shares of its common and 39,049 shares of its preferred stock, which on the cancellation of certain shares in connection with the stock of one of the noncarriers would leave outstanding 633,171 shares of common and 37,942 shares of preferred. Another 15,000 shares of preferred were to be offered to the public in order to enable Associated to obtain surplus cash. The preferred, which like the common was entitled to one vote per share, was convertible into common at the option of the holders, on terms not here relevant. There were 71,480 shares of Associated's common stock outstanding at the time the application was filed: of which 31,240 were held by the president of Associated, 9,000 by The Transport Company (received for engineering accounting data given in connection with the merger), and the remainder by stockholders in the corporations to be merged.

posed merger and the railroads, the Commission concluded that Associated would not be affiliated with any rail carriers. With the elimination of Arrow, of course, the likelihood of any influence on Associated's policies by Transport, and thus by Kuhn, Loeb and Company and the railroads, was substantially reduced.

I.

The pertinent provisions of the Interstate Commerce Act, which is controlling, are set forth in the margin.[7] Section 5(2) makes

[7] Section 5 provides in pertinent parts:

"Sec. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 207 (c)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If

lawful a consolidation of the sort here attempted only if the Commission authorizes it. The Commission is empowered to authorize and approve a consolidation either as applied for or as qualified by such terms and conditions as it deems "just and reasonable," if it finds that the merger "will be consistent with the public interest." Section 5(2)(b). In passing upon a proposed consolidation the Commission is required to "give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." Sections 5(2)(c). The foregoing provisions supply the general statutory standards for guiding the Commission's judgment; and

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the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

. . . . . .

"(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(11) The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees, and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

within their broad limits, its authority is "exclusive and plenary." Section 5(11).

However, in two particulars, pertinent especially to the issues concerning anti-trust policy and railroad affiliation, Section 5 lays down more explicit commands. One is a specific exemption of carriers and individuals participating in an approved merger "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved . . . and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." Section 5(11). The other provides the standards to be applied in cases of affiliation of a motor carrier with a railroad. Where a railroad or "any person which is controlled . . . by such a carrier, or affiliated therewith"[8] is an applicant in a consolidation proceeding, the Comission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Section 5(2)(b). In the light of these controlling statutory provisions the issues must be stated more sharply for proper perspective of what is at stake.

II.

As has been said, they are intertwined. This is true especially of the issues concerning the propriety of the standards applied and whether due consideration was given to the anti-trust laws and policies, although the question of rail affiliation is closely related to both.

The chief attack on the orders is that the Commission improperly construed the standards by which Congress intended it to determine the propriety of a consolidation; and the burden of this complaint is that it did so "by failing to consider and give due weight to the anti-trust and other laws of the United States." The argument seems to be that the mergers, notwithstanding the Commission's approval, violates the Sherman Act; hence the Commission is without power to approve the merger. This presupposes that Congress did not intend, by enacting the specific exemption

[8] "Affiliated therewith" is defined in Section 5(6), *supra* note 7.

of Section 5(11), to give the Commission leeway to approve any merger which, but for the exemption and the Commission's approval, would run afoul of the anti-trust laws. In other words, the Commission's authority is not "exclusive and plenary," as the section declares, within the boundaries set by the Interstate Commerce Act, including the exemption; but it is restricted also by all the ramifications of the anti-trust laws and policies, to which the Commission must give strict regard in approving motor consolidations, as if the exemption did not exist.

It is conceded this is not true of rail consolidations, though they are authorized, and subjected to the same standards, by the identical sections of the statute. A difference in application of the language is said to arise from the difference which existed in the conditions under which rail and motor carriers, respectively, were brought within the purview of the statutory commands. Thus, it is said, the Transportation Act of 1920 (41 Stat. 456) made a broad departure from previous policy by relieving rail consolidations, with the Commission's approval, from anti-trust restrictions in order to rehabilitate a broken down industry. But, it is also said, such a condition did not characterize motor carriers when they were brought under regulation in 1935 or at the time of any subsequent legislation affecting them. Hence, it is admitted the Commission with propriety may approve a rail consolidation, otherwise prohibited by the anti-trust laws, in order to bring about needed or desirable improvement in service and economies in operation. But, as to motor carriers, it is urged the consolidation cannot be effected with any such purposes or consequences. Only when the existing service is inadequate and consolidation is necessary to bring about adequate service to the public, the argument runs, can the Commission approve it.

On its face the contention would seem to run in the teeth of the language and the purpose of Section 5(11). Nothing in its terms indicates an intention to create one authority for rail consolidations and another for motor mergers. Identical provisions govern both. And to restrict the application of the section to motor carriers in the manner urged would nullify its operation as to them. The attack, when carried to such an extent, comes down to one upon the policy which Congress has declared. It has done so in terms which do not admit of nullification by reference to the varying conditions under which different types of carriers were

brought within the statute's operation. It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action. The argument in its full sweep therefore must be rejected. But, taken for less than that, it poses a problem of accommodation of the Transportation Act and the anti-trust legislation, to which we now turn. In doing so we note that the former is the later in time and constitutes not only a more recent but a more specific expression of policy.

III.

To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true it cannot without more ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. Cf. *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.

The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the

nation's transportation facilities beginning with the Interstate Commerce Act of 1887.[9] For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives embodied in those efforts.[10] "Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates";[11] and emphasis on the preservation of free competition among carriers was part of that effort.[12] The Act of 1920 added "a new and important object to previous interstate commerce legislation." It sought "affirmatively to build up a system of railways prepared to handle promptly the interstate traffic of the country." *Dayton-Goose Creek R. R.* v. *United States*, 263 U. S. 456, 478; *Texas & P. R. R.* v. *Gulf C. & S. F. R. R.*, 270 U. S. 266, 277. And in administering it, the Commission was to be guided primarily by consideration for "adequacy of transportation service, . . . its essential conditions of economy and efficiency, and . . . appropriate provision and best use of transportation facilities . . . ." *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25.

Since that initial effort at reshaping regulation of railroads to "ensure . . . adequate transportation service,"[13] Congress has extended federal regulation in connection with other forms of transportation[14] and has elaborated more fully the objectives to

[9] 24 Stat. 379. See Sharfman, The Interstate Commerce Commission (1935), Part I, 11-20, and authorities cited, for a concise compilation of the more important legislation implementing the Interstate Commerce Act of 1887 and a reference to some of the impulses leading to the adoption of that Act; see also Healy, The Economics of Transportation (1940) ch. 18 *et seq.*

[10] Compare the Interstate Commerce Act of 1887, 24 Stat. 379, and the statutes collected in Sharfman, *supra* note 9, with the Transportation Act of 1920, 41 Stat. 456 [see also MacYeagh, The Transportation Act of 1920 (1923)], the Emergency Transportation Act of 1933, 48 Stat. 211, and the Transportation Act of 1940, 54 Stat. 898. See also Annual Reports of the Interstate Commerce Commission for 1888, pp. 25-26; 1892, pp. 47-55; 1893, p. 9; 1894, p. 63; 1897, pp. 48-51; 1898, pp. 18-22; 1900, p. 13; 1918, pp. 4-9; 1919, pp. 1-6. See generally, Johnson, Government Regulation of Transportation (1938); Nelson, The Role of Regulation Reexamined, Transportation and National Policy, National Resources Planning Board (May, 1942) 197.

[11] The New England Divisions Case, 261 U. S. 184, 189.

[12] Cf. authorities cited *supra* notes 9 and 10. The Interstate Commerce Act of 1887 (24 Stat. 379) was in a sense a shadow cast by the coming Sherman Act (26 Stat. 209). Compare Snyder, The Interstate Commerce Act and Federal Anti Trust Laws (1904) 121-122.

[13] The New England Divisions Case, 261 U. S. 184, 189.

[14] Cf. e. g., Air Commerce Act of 1926, 44 Stat. 568, as amended by 48 Stat. 1113; Air Mail Act of 1934, 48 Stat. 933; Air Mail Act of 1935, 49 Stat. 614;

be achieved by its legislation. In 1935 it enacted a comprehensive scheme of regulation for motor carriers, designed to result in "a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art."[15] The policy which was to guide the Commission in administering that Act was fully stated[16] and has since been absorbed into the equally full statement of the National Transportation Policy. That policy, which is the Commission's guide to "the public interest," cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Texas* v. *United States*, 292 U. S. 522, demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as to "recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899.

The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of

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Civil Aeronautics Act of 1938, 52 Stat. 973; Motor Carrier Act of 1935, 49 Stat. 543; and compare Title II of the Transportation Act of 1940, 54 Stat. 898, 929.

15 Sen. Rep. No. 482, 74th Cong., 1st Sess., 3.

16 "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part." 49 Stat. 543.

Section 5 (11), that the policies of the anti-trust laws determine "the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business, cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, has its counterpart in motor carrier policy. The premises of motor carrier regulation posit some curtailment of free and unrestrained competition.[17] The origins[18] and legislative history[19] of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when "competition between carriers may result in harm to the public as well as in benefit; and that when a [carrier] inflicts injury upon its rival, it may be the public which ultimately bears the loss." Cf. *Texas & P. R. R.* v. *Gulf C. & S. F. R. R.*, 270 U. S. 266, 277.

Whatever may be the case with respect either to other kinds of transactions by or among carriers[20] or to consolidations of different types of carriers,[21] there can be little doubt that the Com-

[17] No motor carrier can operate in interstate commerce without a certificate of public convenience and necessity. 49 U. S. C. § 306, 49 Stat. 551, 52 Stat. 1238, 54 Stat. 923. Compare Monograph No. 21, Temporary National Economic Committee, 76th Cong., 3rd Sess., 268.

[18] The Reports of the Coordinator of Transportation (Sen. Doc. No. 152, 73d Cong., 2d Sess.; H. Doc. 89, 74th Cong., 1st Sess.) on which the Act is in large measure based (79 Cong. Rec. 12207; Sen. Rep. No. 482, 74th Cong., 1st Sess.; H. R. Rep. No. 1645, 74th Cong. 1st Sess.) disclose graphically that among the evils with which the motor carrier industry was afflicted and which would be cured by the Act was unrestrained competition. It was anticipated that the Act would confer benefits on the industry "by promoting a more orderly conduct of the business, lessening irresponsible competition and undue internal strife, encouraging the organization of stronger units, and otherwise enabling the industry to put itself on a sounder and more generally profitable basis." H. Doc. 89, 74th Cong., 1st Sess., 1944, 127.

[19] See particularly the Reports of the Coordinator of Transportation, cited *supra* note 17.

[19] Sen. Rep. No. 482, 74th Cong., 1st Sess.; 79 Cong. Rec. 12206.

[20] Even after the major shift in policy reflected in the Transportation Act of 1920, Congress left it abundantly clear that the preservation of competition and the elimination of monopolistic practices in many phases of the transportation industry was a desideratum. See e. g., 15 U. S. C. §§ 13, 14, 18-21; 38 Stat. 730 *et seq.*, 48 Stat. 1102, 49 Stat. 1526-1528; 31 I. C. C. 32-61, 31 I. C. C. 351, 413-414; and Section 5 (1) of the Interstate Commerce Act, 41 Stat. 480-481, 54 Stat. 905; and compare Chesapeake & Ohio R. R. v. United States, 283 U. S. 35.

[21] Cf. 49 U. S. C. § 5, 14 (16); 37 Stat. 566, 41 Stat. 482, 54 Stat. 909. In connection with the consolidation of rail and motor carriers Congress was explicit on the subject of competition in its mandate to the Commission. Fear-

mission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by "encouraging the organization of stronger units" in the motor carrier industry.[22] And in authorizing those consolidations it did not import the general policies of the anti-trust laws as a measure of their permissibility.[23] It in terms relieved participants in appropriate mergers from the requirements of those laws. Section 5 11. In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against this background no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value,[24] is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

Therefore, the Commission is not bound, as appellants urge, to accede to the policies of the anti-trust laws so completely that

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ful of the dangerous potentialities which such coordination might create (see 79 Cong. Rec. 5654-5655, 12200, 12222-12225). Congress prescribed more rigorous requirements for that process than for simple motor carrier consolidations. For the latter approval may be granted if the Commission finds the transaction "consistent with the public interest." For a rail carrier to consolidate with a motor carrier, Commission approval requires a finding that the transaction will "be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." Compare the language of Section 213 (a) of the Motor Carrier Act of 1935, 49 Stat. 555-556, 52 Stat. 1249, (and cf. 80 Cong. Rec. 11546) with that of Section 5 of the Transportation Act of 1940.

[22] Cf. note 17 *supra*. Authorization of consolidation of rail carriers stems historically from circumstances different from those impelling the authorization of consolidation of motor carriers. Compare authorities cited in notes 9 and 10 *supra* with those in notes 17-19 *supra*. This difference in origins is not entirely to be ignored simply because the same provisions of Section 5 now govern both motor carrier and rail carrier consolidations. Cf. 80 Cong. Rec. 11546. But whatever effect the difference may have as a guide to the Commission concerning the extent to which and circumstances in which consolidation should be allowed, it cannot nullify the power given to the Commission by Section 5(11).

[23] Compare the provisions of the statutes cited *supra* notes 20 and 21.

[24] Cf. note 20 *infra*; compare also 41 Stat. 481-482; Chesapeake and Ohio R. R. v. United States, 283 U. S. 35; MacVeagh, The Transportation Act of 1920 (1923) 275-292.

only where "inadequate" transportation facilities are sought to be made "adequate" by consolidation can their dictates be overborne by "the public interest." That view, in effect, would require the Commission to permit only those consolidations which would not offend the anti-trust laws. As has been said, this would render meaningless the exemption relieving the participants in a properly approved merger of the requirements of those laws, and would ignore the fact that the Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices.[27] Compare *Dayton-Goose Creek R. R.* v. *United States, supra; The New England Divisions Case, supra.*

Congress however neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy. Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commission power to control such developments.[28] The national transportation policy requires the Commission to "promote . . . economical . . . service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, or undue preferences or advantages . . . ." The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

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[27] Cf. note 17 *supra.*

[28] E. g., Senator Wheeler, in charge of the measure in the Senate, said:

"At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizable systems. In view of past experience with railroad and public utility unifications, it is regarded as necessary that the Commission have control over such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance." 79 Cong. Rec. 5654-5655.

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation, and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed consolidation is "consistent with the public interest". Cf. *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell* v. *United States*, 315 U. S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order.

IV.

The Commission found, as has been noted, that the proposed consolidation would result in improved transportation service, greater efficiency of operation and substantial operating economies. The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to more efficient use of equipment and save motor fuel. Terminal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced.[27] The Commission also considered the extent to which competition among the merging carriers would be diminished, the effects of the consolidation on competing carriers and the consequences for transportation service and motor carrier operations in general in the

[27] E. g., tracing shipments and settlement of claims would be facilitated, congestion at shipping platforms would be reduced, the average life of the equipment would be lengthened by scientific maintenance and safety programs on a large scale, vehicles would be shifted quickly to meet peak demands on certain routes, etc.

areas affected. It found that in each of the areas served by the present components of the merger there are from 44 to more than 100 Class I carriers, many of which were regular route common carriers of general commodities, comparable in size—insofar as size is disclosed by operating revenues—to some of the participants in the consolidation. Between the principal points in each of the areas served substantial competition by independent Class I carriers now exists. While none of these carriers operates a through service over the entire area to be served by Associated, the Commission found that rail carrier service competes at all the principal points to be served by Associated, and that contract carriers also offer competition.

The Commission determined, on the basis of facts appearing in the record and its experience with other consolidations, that it was not likely that Associated's size and competitive advantages would enable it to control the price and character of interchange traffic, to drain off substantial amounts of shippers' business or in other ways to smother the competition of other motor carriers. It concluded that ample competition would remain and, weighing all the factors, that the consolidation was "consistent with the public interest."

Necessarily in its inquiry the Commission had to speculate to some extent as to the future consequences and effects of a present consolidation. But it based its judgment on available facts as to present operations and business practices and past experience with transportation operations and analogous transactions.

We cannot say that the Commission measured "the public interest" by standards other than those Congress provided or that its findings do not comply with the requirements of the Act. The material findings are supported by evidence; and while a more meticulous regard for its function might have impelled the Commission to accede to the Anti-Trust Division's request for certain information from other shippers bearing on the question of competition we do not think its failure to do so requires, on this record, that its conclusions be overturned.

V.

Appellants also attack the propriety of the Commission's conclusion that Associated is not, and would not be, on consummation of the consolidation, "affiliated" with any railroad. Whatever

might have been the case if Arrow had been included in the merger, a different question is presented by the orders now under review.

Section 5(2) provides:

> That if . . . any person which is controlled by a [rail] carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 5(6) provides:

> For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

The only relevant evidence now pointing toward affiliation of the applicant with rail carriers are the facts that Kuhn, Loeb and Company indirectly owns 9,000 shares of Associated's common stock, has one representative among the nine directors of Associated, has investment banking connections with competing rail carriers, and is represented on the boards of directors of other railroads. For present purposes we may assume that by virtue of those connections the rail carriers' interests will be the banking house's interests in directing the affairs of Associated. But aside from the proportionately small 9,000 out of 1,000,000 common shares stock ownership and the place on the board of directors, the Commission found no connection—either in the origins of the present proposal or in personnel, financing or otherwise—between Kuhn, Loeb and Company and the rail carriers on the one hand and Associated on the other. This contrasts sharply with the circumstances in *Transport Co.*, 36 M. C. C. 61, where a much larger merger of eastern motor carrier operators, sought to be consummated with at least the assistance of Kuhn, Loeb and Company, was denied approval by the Commission. And in the present

merger others, not associated, so far as this record shows, with Kuhn, Loeb and Company or rail carriers would have substantial blocks of stock.[28] We cannot find anything arbitrary or unreasonable in the conclusion that the consolidation as finally authorized will not result in Associated's being affiliated with a carrier by rail. It may be added that under the Commission's order in this case the relatively close holdings which will emerge from the consolidation cannot be altered without the Commission's approval. And it is the consolidation as approved which is exempted from the operation of the anti-trust laws and the prohibition against rail affiliation without approval. Any future change which may bring the consolidation into clash with either prohibition may be considered when it arises.

Accordingly the judgment is

Affirmed.

Mr. Justice MURPHY is of the opinion that the judgment should be reversed.

[28] E. g., H. D. Horton and the members of his family will own 14,917 shares of Associated's preferred stock and 267,873 shares of its common stock. The stockholders of Consolidated also would own substantially greater blocks than the 9,000 shares which Kuhn, Loeb and Company controls.

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1943.

McLean Trucking Company, Inc., The Secretary of Agriculture of the United States, and American Farm Bureau Federation, Appellants,
vs.
The United States of America, Interstate Commerce Commission, Associated Transport, Inc., Barnwell Brothers, Inc., et al.

Appeal from the District Court of the United States for the Southern District of New York.

[January 17, 1944.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

I think that the Commission misconceived its authority under the merger and consolidation provisions of the Act. I agree that the Commission is not to measure motor vehicle consolidations by the standards of the anti-trust acts. Such a construction would make largely meaningless, as the opinion of the Court demonstrates, the power of the Commission under § 5(11) to relieve participants in mergers or consolidations from the requirements of those acts. But I think a proper construction of the Act requires the Commission to give greater weight to the principles of competition than it apparently has done here.

I agree that the standard of the "public interest" which governs mergers and consolidations under § 5 embraces the national transportation policy contained in the Act. That declared policy calls, among other things, for the recognition and preservation of "the inherent advantages" of motor vehicle transportation; the promotion of "safe, adequate, economical, and efficient service" and the fostering of "sound economic conditions in transportation and among the several carriers"; the establishment and maintenance of reasonable charges "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive prac-

tices"—to the end of "developing, coordinating, and preserving a national transportation system" which is "adequate to meet" the national needs. 54 Stat. 899. Those standards are specifically referred to in § 5(2)(c) where an itemization of some of the factors to which the Commission shall give weight is made. And the preamble itself states that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

But I am of the opinion that the concept of the "public interest" as used in § 5 also embraces the anti-trust laws. Those laws extend to carriers as well as to other enterprises. But for the approval of the Commission the present consolidation would run afoul of the Sherman Act. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. And the Clayton Act (which makes specific references to common carriers) by § 11 expressly entrusts the Commission with the authority of enforcement of its provisions "where applicable to common carriers." 38 Stat. 734, 15 U. S. C. § 21. Those laws still stand. We thus have a long standing policy of Congress to subject these common carriers to the anti-trust laws. And we should remember that, so far as motor vehicles are concerned, we are dealing with transportation units whose rights of way—the highways of the country—have been furnished by the public. These considerations indicate to me that while the power of Congress to authorize the Commission to lift the ban of the anti-trust laws in favor of common carriers is clear (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25-26), administrative authority to replace the competitive system with a cartel should be strictly construed. I would read § 5 of the Transportation Act so as to make for the greatest possible accommodation between the principles of competition and the national transportation policy. The occasions for the exercise of the administrative authority to grant exemptions from the anti-trust laws should be closely confined to those where the transportation need is clear.

If it were the opinion of the Commission that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, I have no doubt that it would be authorized to lift the ban of the anti-trust laws. But unless such necessity or need were shown I do not think the anti-trust laws should be made to give way. Congress did not give the Commission *carte blanche* authority to substitute a cartel for a

competitive system. It may so act only when that step "will be consistent with the public interest". § 5(2)(b). But since the "public interest" includes the principles of free enterprise, which have long distinguished our economy, I can hardly believe that Congress intended them to be swept aside unless they were in fact obstacles to the realization of the national transportation policy. But so far as we know from the present record that policy may be as readily achieved on a competitive basis as through the present type of consolidation. At least such a powerful combination of competitors as is presently projected is not shown to be necessary for that purpose. In this case the hand of the promoter seems more apparent than a transportation need.

For these reasons I would resolve the ambiguities of the Act in favor of the maintenance of free enterprise. If that is too niggardly an interpretation of the Act, Congress can rectify it. But if the Commission is allowed to take the other view,[1] a pattern of consolidation will have been approved which will allow the cartel rather than the competitive system to dominate this field. History shows that it is next to impossible to turn back the clock once such a trend gets under way.

But there is another phase of the case which in my view requires a reversal of the judgment below. The Commission has allowed the investment banker of railroad companies to be represented on the board of the motor vehicle company. It did so after a finding that it was not "reasonable to believe that the affairs of applicant would be managed in the interest of any railroad" and therefore that the motor vehicle company would not be affiliated with any railroad within the meaning of the Act. § 5(5)(a), (6). But though we assume there was no such affiliation, I agree with Commissioner Patterson that that is not the end of the matter. The question still remains whether it is "consistent with the public interest" to allow such a banker's nexus between the two competitors. I cannot believe that Congress intended the Commission to treat such a matter as inconsequential. The whole history of finance urges caution when one investment banker stakes out his claim to

[1] The position here taken is substantially the view which originally obtained in the Commission: Northland-Greyhound Lines, Inc., 5 M. C. C. 123; Richmond-Greyhound Lines, Inc., 35 M. C. C. 555. But that view did not long obtain. See Northland-Greyhound Lines, Inc., 25 M. C. C. 109; Richmond-Greyhound Lines, Inc., 36 M. C. C. 747. And see Meck & Bogue, Federal Regulation of Motor Carrier Unification, 50 Yale L. Journ. 1376, 1393-1397.

two competing companies. Experience shows that when one gains a seat at his competitor's table, it is the beginning of the end of competition. A new zone of influence has been created. Its efficacy turns not on the amount of stock ownership but on a host of subtle and imponderable considerations. Such an intertwined relationship has been "the root of many evils" (Brandeis, Other People's Money, p. 51) and so demonstrably inimical to the "public interest" in the past as not to be disregarded today.

I agree that if § 5 were read as the Court reads it, the order of the Commission should be affirmed. But since the Commission took a view of the law which in my opinion was erroneous, I would reverse the judgment below so that the case might be returned to the Commission for reconsideration of the application under the proper construction of § 5.